In The

Supreme Court of the United States

October Term 1975

No. 75-1861

GORDON G. PATTERSON, JR.,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the
New York Court of Appeals

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant Gordon G. Patterson, Jr., appeals to this Court from the judgment and order of the New York Court of Appeals entered on April 1, 1976, which affirmed Appellant's conviction for murder and submits this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of the New York Court of Appeals was rendered on April 1, 1976. *People v. Patterson*, 39 N.Y.2d 288 (1976). The opinion is attached hereto as Appendix A. No other opinions were rendered.

JURISDICTION

This appeal arises from the conviction of Appellant for the crime of murder in the County Court of Steuben County on July 6, 1971. This conviction was affirmed without opinion in the Supreme Court, Appellate Division, Fourth Department on May 18, 1973. *People v. Patterson*, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (4th Dept. 1973).

The Court of Appeals, by a vote of 4-3, affirmed Appellant's conviction and upheld the validity of New York Penal Law, §§25.00; 70.00; 125.20 and 125.25 (1)(a) against Appellant's contention that these statutes, upon which his conviction and sentence were based and which shifted to him the burden of proving facts which would reduce murder to manslaughter, are repugnant to the Due Process clause of the Fourteenth Amendment to the United States Constitution as construed by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970).

The decision of the New York Court of Appeals was filed and entered on April 1, 1976. Upon this judgment and order of the Court of Appeals and pursuant to New York Civil Practice Law and Rules, Rule 5524, the judgment of the County Court affirming the conviction was entered in the Steuben County Clerk's Office on May 17, 1976. Copies of these judgments and orders appear as Appendix B.

A timely Notice of Appeal to this Court from the judgment and order of the New York Court of Appeals was filed on May 26, 1976 in the Steuben County Court, the Court possessed of

the record. A copy of this Notice of Appeal appears as Appendix C.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1257(2).

STATUTES INVOLVED

United States Constitution, Amendment XIV.

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

New York Penal Law, §§25.00; 70.00; 125.00; 125.20 and 125.25 are fully set forth in Appendix D herein. Pertinent excerpts follow:

§ 125.25 *Murder in the second degree*

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

> (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; ....

* * * *

§ 125.20 *Manslaughter in the first degree*

A person is guilty of manslaughter in the first degree when:

* * *

2. With intent to cause the death of another person, he causes the death of such person or of a third person

under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; . . .

§ 25.00 *Defenses; burden of proof*

* * *

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

QUESTION PRESENTED

Whether the statutory provisions of the New York Penal Law, which placed the burden on Appellant at his trial for murder to prove that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter, on their face and as applied to Appellant, violate the Appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution as construed by this Court in *MULLANEY v. WILBUR*, 421 U.S. 684 (1974) and *IN RE WINSHIP*, 397 U.S. 358 (1970).

STATEMENT OF THE CASE

This appeal arises from Appellant's conviction for murder. The uncontroverted facts are as follows:

Appellant Gordon Patterson and his wife Roberta had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults (R. 561-64). As a result of one

*R refers to pages in the original Record on Appeal before the Court of Appeals.

such incident, Roberta Patterson left her husband and instituted divorce proceedings (R. 574-82). She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to the defendant (R. 442, 584). On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him (R. 480, 510). At the trial, Appellant raised the affirmative defense that at the time of the alleged crime he was "acting under the influence of extreme emotional disturbance". Pursuant to the New York statutory scheme Appellant had the burden of proving this affirmative defense by a preponderance of the evidence in order to reduce murder to manslaughter. Penal Law, §§25.00; 125.20; 125.25 (1)(a).

Appellant called Dr. William Libertson, a practicing psychiatrist (R. 984) whom the District Attorney described as having impressive qualifications (R. 1128). Dr. Libertson testified that in his opinion Appellant, at the time of entering the scene of the alleged crime, was acting under the influence of extreme emotional disturbance. Dr. Libertson explained that the impact of Appellant's wife's rejection led to a rising state of emotionality and poor control (R. 998). He testified that with a reasonable degree of medical certainty (R. 1016), that Appellant at the time of the shooting, was under such a state of extreme emotional disturbance that his perceptions were warped, his acts were irrational, and his ability to control himself was defective (R. 1018).

Another psychiatrist, Dr. Martin Lubin of New York City, who was retained by the prosecution, examined Appellant prior to trial. The District Attorney did not call Dr. Lubin to testify

and conceded that Dr. Lubin's testimony would have supported the testimony of the Appellant's witness, Dr. Libertson (R. 1075, 1129).

Based on the homicide provisions of the New York Penal Law, the trial judge charged the jury:

> "I have already instructed you that, generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you both that he was so emotionally influenced, and that it is a reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence . . . .". (R. 1202, 1203).

* * * * * *

"I would again refer to the crime of manslaughter in the first degree, and say that if you find that the defendant killed John Northrup with intent to cause his death or with intent to cause the death of another person or persons, and if you find — not beyond a reasonable doubt but by a preponderance of the evidence — that he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, your verdict must be one of manslaughter in the first degree." (R. 1212)

* * * * * *

"The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree. . . ." (R. 1206)

* * * *

> "This does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide but is punishable in a less severe manner than murder." (R. 1210).

The jury returned a verdict of guilt and a judgment of conviction for murder was entered in the Steuben County Court on July 6, 1971. Appellant was sentenced to a term of 20 years to life imprisonment. The Supreme Court of the State of New York, Appellate Division, Fourth Department, unanimously affirmed the conviction without opinion, by judgment and order dated, May 18, 1973. *People v. Patterson*, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (4th Dep't. 1973). Permission to Appeal was granted by a Judge of the New York Court of Appeals and a Notice of Appeal to the New York Court of Appeals was filed on November 30, 1973.

On April 1, 1976, the Court of Appeals, by a 4-3 vote, affirmed Appellant's conviction for murder and upheld the constitutionality of the New York Penal Law provisions which required Appellant to prove that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter. The majority opinion held that "the law of this State does not infringe the due process interests that *Mullaney* sought to protect" (A-9)* The New York Court of Appeals concluded that *Mullaney* is not applicable because, unlike Maine, the New York affirmative defense in question "does not negate intent" which "the prosecution is at all times required to prove . . . ." (A-16). The New York Court concluded further that *Mullaney* was distinguishable on the grounds that "the opportunity opened for mitigation differs significantly from the traditional heat of passion defense." (A-16). Yet, noting that the three dissenters formed a contrary interpretation of

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*A refers to pages in Appendix A attached hereto.

Mullaney, the Court stated: "To be sure, the issue is not free from doubt". (A. 17).

Even greater doubt was expressed by one of the 4-3 majority, Judge Jones, who in a separate concurring opinion stated:

> "Thus, I am not prepared ... to strike down the provision here under review because on one analysis the opinion of the United States Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684, would appear to call for that result. Another reading of the same opinion leads *others* to a different conclusion. In that circumstance, I conclude that, until there has been an explicit determination by the Supreme Court which permits us no alternative, it serves better in this case to leave to that Court the articulation of its views ..." (A. 22) (Emphasis added.)

The separate concurring opinion of Chief Judge Charles Breitel, favorably referred to in the majority opinion (A. 18) reveals a basic disagreement with this court's decision in *Mullaney* (A. 19-A. 21). He states:

> "The placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the 'element" of mitigating circumstances is generally unfair." (A. 20)

The three dissenters would have voted to reverse Appellant's conviction on the basis that *Mullaney* was "determinative" of his due process claim (A. 26).

Significantly, the majority opinion specifically found that "the People did not controvert the testimony of the defense psychiatrist ..." (A. 18). This finding highlights the crucial nature of the burden of proof issue in this case.

How the federal question was presented. While this appeal was pending in the New York Court of Appeals, this Court decided *Mullaney v. Wilbur, supra*, on June 9, 1975. After the

Mullaney decision was rendered the *Mullaney* question was presented to the Court of Appeals in "Appellant's Supplemental Brief". In this brief, Appellant challenged the homicide statutes under which he was convicted on the basis that it was a violation of his Fourteenth Amendment due process rights to require him to bear the burden of proving facts which would reduce the crime from murder to manslaughter. Appellant claimed that *Mullaney v. Wilbur, supra*, and *In re Winship*, 397 U.S. 358 (1970) were controlling.*

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

A. The majority opinion below, upholding the validity of the New York Penal Law requirement that the defendant in a murder prosecution must bear the burden of proving the affirmative defense that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter, is in direct conflict with this Court's decisions in *Mullaney v. Wilbur* and *In re Winship*.

1. *The New York Affirmative Defense Provisions are Functionally Identical to the Maine Rule Declared Unconstitutional by This Court in* Mullaney v. Wilbur.

The New York Court of Appeals decision below is in direct conflict with *Mullaney v. Wilbur*, 421 U.S. 684 (1975) because the New York statutory scheme challenged by Appellant is

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*The Court of Appeals was unanimous in its conclusion that Appellant properly and timely raised his challenge to the constitutionality of the New York Penal Law. See Stern and Gressman, Supreme Court Practice, (4th Ed. 1969), Section 3.28, pp. 127-128. In so far as the timing of when the federal question was raised, this case is in the precise procedural posture as *Mullaney v. Wilbur*, 421 U.S. 684, at p. 688, f.n. 7; and p. 704, footnote (concurring opinion).

functionally identical to the Maine rule declared unconstitutional in *Mullaney*.

In *Mullaney* this Court unanimously held that it was a violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution for a state to require a defendant in a murder trial to bear the burden of proof of a fact which would reduce murder to manslaughter.

In reaching this conclusion this Court rejected Maine's contention that this Court's decision *In re Winship* was inapplicable because the challenged rule in Maine involved only "reductive factors".* The gravamen of *Mullaney* is that where proof of a fact (e.g. "heat of passion") leads to conviction of an offense of lesser criminal culpability (e.g. manslaughter as opposed to murder), even though not leading to total exoneration, the due process principles of *In re Winship* require that the prosecution bear the burden of proving that "critical fact in dispute" (*Mullaney* at p. 701).

The New York affirmative defense in question has the same function as the "heat of passion" affirmative defense of Maine in that if defendant proves the defense the crime is reduced from murder to manslaughter. As in Maine, the New York affirmative defense is a mitigating element reducing murder to manslaughter rather than complete exoneration of the crime charged. As in Maine, the due process interests to be protected by proof of "the critical fact in dispute" ("heat of passion" in Maine or "extreme emotional disturbance" in New York) are the stigma attached to murder as opposed to manslaughter and significant punishment differentials.** As in Maine, the New

*These "reductive factors" referred to mitigation from murder to manslaughter upon proof by a defendant that he was acting in the "heat of passion" at the time of the alleged crime.

**The Court of Appeals did not question that the punishment differentials between murder and manslaughter in New York are "significant." (A. 15). See New York Penal Law Section 70.00 in Appendix D.

York affirmative defense in question distinguishes the crime of murder from the crime of manslaughter. In terms of *Winship*, both the Maine and New York affirmative defenses require the defendant to prove the "facts necessary to constitute the crime". *In re Winship, supra*, at 364.

Despite clear doubt about its own conclusion, the majority of the New York Court of Appeals upheld the validity of the challenged New York statutes, concluding that" . . . the New York law of homicide differs significantly from the Maine law struck down in *Mullaney*", and therefore the New York law ". . . does not infringe the due process interests that *Mullaney* sought to protect". (A. 9). The majority viewed the Maine law as requiring the defendant to negate malice aforethought with proof that he acted under the heat of passion in order to reduce murder to manslaughter. The majority interpreted *Mullaney* as striking down the Maine rule because ". . . the state could not constitutionally provide the prosecution with a presumption of malice and then require the defendant to negate it with proof that he acted under the heat of passion" (A. 15 — A. 16). Thus, the majority reasoned that *Mullaney* does not apply because, unlike Maine, "(I)n New York, the prosecution is at all times required to prove, beyond a reasonable doubt, the facts bearing the defendant's intent" (A. 16).

This view of the majority of the New York Court of Appeals directly conflicts with the clear holding of *Mullaney*. In *Mullaney*, this Court stressed that the due process requirements of *Winship* are not satisfied where the burden of proof is placed on the defendant to prove the fact that distinguishes murder from manslaughter even though the prosecution carries the overall burden to prove intent beyond a reasonable doubt.

Further, Appellant submits that as to proof of intent there is no difference between the Maine and New York law of homicide. In Maine, as in New York, the prosecution bears the

burden to prove intent beyond a reasonable doubt. As the Court stated in *Mullaney:*

> "The Maine law of homicide, . . . , can be stated succinctly: Absent justification or excuse, all *intentional* or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder . . . unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter . . ." 421 U.S. 684, at pp. 691-2. (Emphasis added) (Footnotes omitted).
>
> * * *
>
> "The trial court instructed the jury that Maine law recognizes two kinds of homicide, murder and manslaughter, and that these offenses are not subdivided into different degrees. The common elements of both are that the homicide be unlawful — i.e. neither justifiable nor excusable — and that it be intentional. The prosecution is required to prove these elements by proof beyond a reasonable doubt, and only if they are so proved is the jury to consider the distinction between murder and manslaughter." 421 U.S. 684, at pp. 685-6.

Therefore the New York Court's reliance on this distinction between Maine and New York law is erroneous.

The majority of the Court of Appeals also distinguished *Mullaney* on the basis that "(T)he opportunity opened for mitigation differs significantly from the traditional heat of passion defense" (A. 16). The majority stated, concerning the difference between the traditional and modern version of the affirmative defense;*

> "An action influenced by an extreme emotional disturbance is not one that is *necessarily* so spontaneously unintentional. Rather it *may* be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably *coming to the fore.*" (A. 16 — A. 17)* (Emphasis added).

*The majority opinion recognized that language of the New York affirmative defense is clearly derived from the "heat of passion" defense of common law (A. 14). See, *Fuentes v. State,* 349 A.2d 1, 5 (1975) where the Delaware Supreme Court held *Mullaney* to be applicable to the Delaware affirmative defense of "extreme emotional distress".

The New York and Maine affirmative defenses both distinguish murder from manslaughter and require the defendant to prove the distinguishing element. *Mullaney* does not rest on the language or precise scope of these affirmative defenses, but rather on the fact that the burden is shifted to the defendant to prove the fact which reduces murder to manslaughter. The New York affirmative defense to murder functions identically to the Maine affirmative defense struck down in *Mullaney* because it is "the single most important factor in determining the degree of culpability attaching to an unlawful homicide." (421 U.S. 684 at 696).

For these reasons, Appellant argues that *Mullaney* is determinative of Appellant's claim and the decision of the Court of Appeals is thus in conflict with *Mullaney.*

2. *The Decision in* People v. Patterson *if Left Standing, Will Circumvent This Court's Decision in* Mullaney.

The majority opinion of the Court of Appeals upholds the constitutionality of a statutory scheme which shifts to the defendant the burden of proving a fact which is the distinguishing element between murder and manslaughter and which results in a "significant" punishment differential. Thus, the decision in *People v. Patterson,* if left standing, provides the statutory model to circumvent *Mullaney* and *Winship.* Any state legislature could enact the New York statutory scheme; the constitutionality of such legislation could be upheld by reliance on the New York interpretation of *Mullaney* in *Patterson.*

*The defense of insanity is clearly not involved being a distinct concept in New York and requiring the prosecution to bear the burden of proof. New York Penal Law §§25.00, 30.05.

Mullaney made clear that the principles of *Winship* should not be undermined by legislative redefinition of "the elements that constitute different crimes . . ." 421 U.S. 684 at 698). Specifically, *Mullaney* held that the due process principles of *Winship* cannot be circumvented by a state providing for "reductive factors" to be proved by the defendant which reduces murder to manslaughter.

This Court should hear this appeal to insure the states' compliance with the decision in *Mullaney*.

B. The New York decision in *Patterson* is in conflict with other states.

The decision in *Patterson* is in conflict with other states deciding the *Mullaney* issue.

The Supreme Court of Delaware has invalidated the Delaware requirement that the defendant must prove the affirmative defense of "extreme emotional distress" in light of *Mullaney*. *Fuentes v. State*, 349 A.2d 1 (1975). It is noteworthy that the Delaware Supreme Court viewed the "extreme emotional distress" defense as a "substitute" for the common law defense of provocation and viewed the New York affirmative defense as "analogous". *Fuentes v. State*, *supra*, at p. 5.

The North Carolina Supreme Court in holding invalid the North Carolina rule requiring the defendant to prove self-defense (*State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975)), made it clear that the North Carolina rule requiring the defendant to prove the "heat of passion" defense is also invalid in light of *Mullaney*.

The Maryland Court of Special Appeals has voided, *inter alia*, the Maryland rule that the defendant must prove "heat of passion" on the basis of *Mullaney*. *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975). A petition for writ of certiorari to

review the *Evans* decision was granted by the Maryland Court of Appeals on February 13, 1976. The appeal is pending.

In light of the conflict between New York and other state courts, this Court should hear this appeal to insure uniformity in the application of the constitutional mandates of *Winship* and *Mullaney*.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: Ithaca, New York
June , 1976

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE NEW YORK COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

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4 No. 70

The People &c.,

Respondent,

vs.

Gordon G. Patterson, Jr.,

Appellant.

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(70)

Betty D. Friedlander and Victor J. Rubino for appellant.

John M. Finnerty, District Attorney, for respondent.

JASEN, J.:

The principal issue on this appeal is whether, in a murder prosecution, constitutional due process limitations are invaded by placing the burden of persuasion on a defendant with respect to the defense of acting "under the influence of extreme emotional disturbance" in order to reduce the homicide to the less culpable crime of manslaughter in the first degree.

The defendant, Gordon Patterson, and his wife, Roberta, had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults. As a result of one such incident, Roberta Patterson left her husband and instituted divorce proceedings. She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to

the defendant. On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him. The defendant confessed to the killing and, after a hearing, the confession was held voluntary and was admitted into evidence against him at trial. Defendant's wife, an eyewitness to the crime, testified, over objection of defense counsel, that defendant fired two shots at the victim from close range. The defense called eleven witnesses, including the defendant, who testified in great detail as to the defendant's life and particularly that period of his life when he was married to Roberta Patterson. The defense at the trial was that the crime, if there was one, was unintentional. This was based on defendant's version of events to the effect that the gun went off accidentally. Defendant also raised the affirmative defense that at the time of the alleged crime, he was acting under the influence of extreme emotional disturbance.

The court's charge to the jury was based on the homicide provisions of the Penal Law (§§ 125.25 [subd (1)(a)][1] , 125.20

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[1]Penal Law, section 125.25 (subd [1][a]):

"*§ 125.25 Murder in the second degree*

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or * * * *"

[subd (2)][2]). The jury was instructed that "[t]he mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond a reasonable doubt that the defendant acted intentionally." The People were required to establish beyond a reasonable doubt that the defendant "intended, in firing the gun, to kill either the victim himself or some other human being." To find intent, the jury had to conclude that the defendant had the "conscious objective to cause death, and that his act or acts resulted from that conscious objective." The jury was cautioned that they "must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

With respect to the defense of extreme emotional disturbance, the court stated that the point of this evidence was to convince

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[2]Penal Law, section 125.20 (subd [2]):

"*§ 125.20 Manslaughter in the first degree*

A person is guilty of manslaughter in the first degree when:

* * * *

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; * * * *"

the jury, by a preponderance of the evidence, that "the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." The court did not elaborate on the definition of "extreme emotional disturbance", noting that the words are "self-evident in meaning". However, the court cautioned that " 'extreme' precludes mere annoyance or unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it." As to the burden of proof, the court repeated its earlier instruction that "generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse."

Finally, the court instructed the jury that "[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree * * * *". The court went on to explain that "[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide, but is punishable in less severe manner than

murder." No objection was taken to the above quoted portions of the court's charge.[3]

The jury found the defendant guilty of murder. The Appellate Division unanimously affirmed the judgment of conviction.

During the pendency of this appeal, the United States Supreme Court decided the case of *Mullaney* v. *Wilbur* (421 US 684), wherein the court, passing on a Maine statute, held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (421 US at p 704.) Defendant argues that *Mullaney* is controlling in this case and requires the striking down of Penal Law sections 125.20 and 125.25 to the extent that they require a defendant charged with murder to bear the burden of proving the affirmative defense that he acted under the influence of extreme emotional disturbance.

At the threshold we are confronted with two procedural issues. The first is whether the defendant has preserved a question of law for our review, and, secondly, even if he has, whether *Mullaney* should be applied retroactively to a trial already completed. The defendant's constitutional contentions are based entirely upon a reading of the *Mullaney* decision. The jury was charged by the court on June 7, 1971, four years and two days in advance of *Mullaney*. At that time none of the various affirmative defenses contained in the 1967 revision of the Penal Code had yet been attacked on due process grounds. (See *People* v. *Laietta*, 30 NY2d 68, cert den 407 US 923

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[3]The only objection taken to the charge was that the jury could "infer" from the court's instructions that its only choice was between murder and manslaughter, whereas the jury could acquit the defendant. We note that the court's instructions are not susceptible to any such "inference" and that this point is not advanced by the defendant on appeal.

[affirmative defense of entrapment].) In May 1973, when the Appellate Division affirmed the judgment of conviction, there was no intimation that the homicide provisions might be vulnerable to serious constitutional challenge. In fact, the initial brief filed by appellant in our court did not raise a due process argument. The point was raised for the first time in a supplemental brief prepared after *Mullaney* was handed down.

Our court, with a narrow exception applicable in capital cases, is strictly a law court. A failure to object to a charge at a time when the trial court had an opportunity to effectively correct its instructions does not preserve any question of law that this court can review. (CPLR § 470.05, subd 2; *People* v. *Robinson*, 36 NY2d 224, 228.) Strict adherence to the requirement that complaint be made in time to permit a correction serves a legitimate state purpose. (*Henry* v. *Mississippi*, 379 US 443, 447.) A defendant cannot be permitted to sit idly by while error is committed, thereby allow the error to pass into the record uncured, and yet claim the error on appeal. Were the rule otherwise, the state's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant. While the review by this court is restricted, on the initial appeal to the Appellate Division, that court, with its broader powers of review, may consider claims of error, notwithstanding a failure to object. (CPL § 470.15; *People* v. *Robinson*, *supra*.)

There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law. (*Cancemi* v. *People*, 18 NY 128, 138; *People ex rel. Battista* v. *Christian*, 249 NY 314, 319.) In *Cancemi*, it was held that a defendant could not consent to being tried by a jury of less than twelve members. In *People ex rel. Battista* v. *Christian* (*supra*), the

court ruled that an information charging a defendant with an "infamous" crime was a nullity, despite defendant's consent, where the State Constitution provided that infamous crimes could be prosecuted only by grant jury indictment. Thus, the rule has come down to us that where the court had no jurisdiction, or where the right to trial by jury was disregarded, or where there was a fundamental, nonwaivable defect in the mode of procedure, then an appellate court must reverse, even though the question was not formally raised below. (*People* v. *Bradner*, 107 NY 1, 4-5; see *People* v. *Miles*, 289 NY 360, 363-364.)

This traditionally limited exception has, on occasion, been given broader expression. In *People* v. *McLucas* (15 NY2d 167), the defendant did not object to a comment by the trial court on his failure to testify. Our court ruled that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right." (At p 172.) Since the defendant's right against self-incrimination had been violated, the judgment of conviction was reversed.

As we view it today, the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by constitution and statute. Where the procedure adopted by the court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted. As we stated nearly fifty years ago, "prosecutions must be conducted in substance and without essential change as the Constitution commands." (*People ex rel. Battista* v. *Christian*, 249 NY 314, 319, *supra*.) Defendant Patterson contends that the burden of proof on the issue of extreme emotional disturbance was improperly placed upon him. If the defendant's argument is meritorious, his trial was not conducted in accordance with the procedure mandated by state law. Our law provides that "[n]o conviction of an offense by

verdict is valid unless based upon trial evidence which is legally sufficient and which establishes beyond a reasonable doubt every element of such offense and the defendant's commission thereof." (CPL § 70.20.) If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial, the distribution of the burden of persuasion being just as significant as the proper composition of the jury. Since the error complained of goes to the essential validity of the proceedings conducted below, we believe there is a question of law that our court should review.

We also note that prior to *Mullaney*, there was no doubt in this state that the extreme emotional disturbance affirmative defense was constitutionally valid. The defendant's failure to object to a practice deemed valid in this state cannot deprive him of the right to attack that practice when an intervening Supreme Court decision calls that practice into question. (See *O'Connor* v. *Ohio*, 385 US 92, 93; *People* v. *Baker*, 23 NY2d 307, 317.) It is also significant that *Mullaney* was not handed down until well after the Appellate Division affirmed Patterson's conviction. Were we not to treat appellant's claim on the merits, Patterson would be deprived of a state forum in which his arguments could be heard. (Cf., *People* v. *Robinson*, 36 NY2d 224, 228, *supra*.)

As to the second procedural issue, we hold that the defendant may assert a *Mullaney* claim even though his conviction predates that decision. We note that *Mullaney* was based on the Supreme Court's earlier holding in *In re Winship* (397 US 358), a decision subsequently given retroactive effect. (*Ivan* v. *City of New York*, 407 US 203.) *Mullaney*, like its progenitor *Winship*, should be given retroactive effect.

We, therefore, turn to the merits of the defendant's *Mullaney* claim. In our view, the New York law of homicide differs

significantly from the Maine law struck down in *Mullaney*. We believe that the law of this State does not infringe the due process interests that *Mullaney* sought to protect.

To put the constitutional issues in focus, and to point up the differences between the law of New York and the common law approach still followed in Maine, it is necessary to review the history and development of the law of homicide in this state. As a colony, and then in early statehood, New York drew upon the English common law for its formulations of the homicide offenses. The crimes of murder and manslaughter, the only grades of culpable homicide known to the common law, were defined, and punished, in the same fashion as the English courts had for centuries. (1937 Report of N.Y. Law Rev. Comm., pp 540, 702-410.) In 1829, the Legislature codified, for the first time, the New York law of homicide. Murder was defined as a single, degreeless crime committed "[w]hen perpetrated from a premeditated design to effect the death of the person killed * * * *"[4] (Revised Statutes of New York, 1829, Part IV, Ch 1, Tit 1, § 5.) On the other hand, manslaughter was divided into four degrees. A killing committed "without a design to cause death, in the heat of passion" was a manslaughter. If the killing was accomplished in "a cruel and unusual manner", the crime was a second degree offense; if the killing was accomplished by the use of "a dangerous weapon", it was a third degree offense. An involuntary killing, "by a weapon, or by means neither cruel or unusual" in the heat of passion was manslaughter in the fourth degree. (Revised Statutes, 1829, Part IV, Ch 1, Tit 2, §§ 10, 12, 18.) As a result of this statutory change,

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[4]This statute, as well as the other statutes to be discussed *infra*, contained other provisions, including the forerunners of our present felony murder and "depraved indifference" murder statutes. (See Penal Law, § 125.25 [subds (2), (3)].) However, for present purposes, it is sufficient to confine our discussion to the development of the crimes of intentional murder and voluntary manslaughter.

a "clear-cut and decisive cleavage" was made between the crimes of murder and manslaughter, based upon the presence or absence of a "design to effect death". (1937 Report of the N.Y. Law Rev. Comm., p 544, *supra.*) Moreover, where the common law had implied malice from the very fact of the homicide where a dangerous weapon had been used or the killing had been accomplished in a cruel and inhuman fashion, the New York revision deemed such acts to be manslaughter unless it could be proved that the defendant had a design to effect death. (*Id.*, at p 545.)

In 1860, following the early lead of Pennsylvania and Virginia (see Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1445), the Legislature split the crime of murder into two categories, in an attempt to alleviate some of the harsh effects of capital punishment. Murder "perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing * * *" was murder in the first degree and punishable by death. (L. 1860, ch 410, §§ 1, 2.) Any other murder was in the second degree and punishable by life imprisonment at hard labor. (L. 1860, ch 410, §§ 2, 6.)[5] In 1862, first degree murder was redefined to include killings

[5]This act inadvertently repealed, by the omission of a savings clause, the prior law defining crimes and authorizing the imposition of sentences. (L. 1860, ch 410, § 7.) in *People* v *Hartung* (22 NY 95), the court held that the 1860 statute could not, by virtue of its ex post facto effect, be given retroactive application. Since it appeared that persons accused or convicted prior to the passage of the 1860 Act might have to be released, the Legislature attempted to give the 1860 statute retroactive effect by granting defendants convicted prior to the passage of the 1860 Act or convicted of crimes committed prior to passage, the option of selecting either life imprisonment or the death penalty. (L. 1861, ch 303, § 3.) In 1862, the Legislature reverted back to the law as it stood prior to 1860. (L. 1862, ch 197, §§ 4, 5.) However, a narrowed second degree murder offense was retained. (L. 1862, ch 197, § 5.)

"perpetrated from a premeditated design to effect the death of the person killed." (L. 1862, ch 197, § 5.)

The two-tier murder offense was carried over into the Penal Code of 1881. The first degree offense was committed when the killing was perpetrated out of "a deliberate and premeditated design to effect the death of the person killed". (3 Laws of New York, 1881, § 183[1].) The second degree offense was newly defined as a killing "committed with a design to effect the death of the person killed * * * but without deliberation and premeditation." (3 Laws of New York, 1881, § 184.) The punishments remained death and life imprisonment, respectively. (3 Laws of New York, 1881, §§ 186, 187.) The four degrees of manslaughter were reduced to two. A killing, "[i]n the heat of passion, but accomplished in a cruel and unusual manner or by means of a dangerous weapon" became manslaughter in the first degree, punishable by an imprisonment of between five and twenty years. (3 Laws of New York, 1881, §§ 189 [subd (2)], 192.) A heat of passion killing not committed by use of a deadly weapon or by a cruel and unusual means was a second degree offense, punishable by imprisonment of one to 15 years and/or a fine not in excess of $1,000. (3 Laws of New York, 1881, §§ 193 [subd (2)], 202.) The Penal Law of 1909, the immediate precursor of our present statute, retained the same definitions, with some alteration in the punishments to be meted out. (Former Penal Law, §§ 1044[1], 1045, 1046, 1048, 1050[2], 1051, 1052[2], 1053.)

From this historical review, two points are made abundantly clear. First, New York, since its first statutory enactment in 1829, has always defined murder and manslaughter as separate and distinct offenses with punishments varying to fit the degree of the crime. Maine, on the other hand, has remained truer to the common law by defining but one generic category of felonious homicide, holding out a possibility of mitigation only

in the form of punishment. Secondly, ever since 1829, New York has refused to imply malice from the act of killing, requiring the prosecution to establish, where it seeks to prove a murder, that the defendant possessed a design to effect death. Thus, in *Stokes* v. *People* (53 NY 164), the court held that "[m]ere proof of the killing did not, as a legal implication, show" that the defendant committed the killing from a premeditated design to effect a human death. (At pp 179, 180.) This, again, is in contradistinction to the law of Maine struck down in *Mullaney*. (421 US at p 686, n 4; *State* v. *Lafferty*, 309 A2d 647, 965.) In *Stokes*, the court, in noting that the common law of England implied malice from the proof of killing only, cited the American case most often referred to for that principle, *Commonwealth* v. *York* (50 Mass [9 Metcalf] 93) (53 NY at p 179). The law of Maine is still based on a *York* approach (see 421 US at pp 695, 696), an approach rejected in *Stokes* as in contradiction to the New York statutes (53 NY at p 179).

In 1961, a study commission was appointed to thoroughly review and update penal statutes that had not been subjected to a full scale examination since the 1881 Penal Code. The Revised Penal Law of 1967, the end product of the Commission's work, contained new homicide provisions reflective of contemporary thought, to replace an anachronistic statute replete with concepts whose validity had been substantially eroded by time. Thus, the factors of premeditation and deliberation were discarded entirely. These two concepts, which alone distinguished first degree murder from second degree murder (and therefore death from life imprisonment), had become completely nebulous. (Third Interim Report of the Temporary Commission on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. 1964, No. 14, p 22.) In the words of Mr. Justice Cardozo, "[i]f intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and

premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words." (Cardozo, Law and Literature, pp 100-101; see also, Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1445-1446.) The revised 1967 statute made murder a single, degreeless crime, requiring that the defendant, "[w]ith intent to cause the death of another person, * * * causes the death of such person or of a third person." (Penal Law, § 125.25.)[6]

The manslaughter provisions in the former Penal Law were also substantially revised. Under the old provisions, manslaughter was a fatal assault committed without homicidal intent, without a design to effect death. (Former Penal Law, §§ 1050, 1052.) "Heat of passion" had become, not a mitigating factor that would reduce a murder to manslaughter, but an affirmative element of a specified type of manslaughter. In its

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[6]In 1974, the Legislature added a new crime, murder in the first degree. (Penal Law, § 125.27.) This statute comes into operation where the victim of the murder is a police officer, an officer in a correctional facility or where the defendant was incarcerated for a life sentence. A convicted defendant is to be sentenced to death. (Penal Law, § 60.06.) As part of this enactment, section 125.25, which formerly defined the degreeless crime of murder, was retitled, without a change in substance, murder in the second degree. (L. 1974, ch 367, § 4.)

It is noteworthy that the new first degree murder offense also provides that the defendant may assert the affirmative defense of extreme emotional disturbance. (Penal Law, § 125.27[2][a].) Successful interposition of the defense would reduce the crime to manslaughter in the first degree, not to murder in the second degree.

proposed statute, the Commission suggested the elimination of the "hybrid offense" that had developed in New York, coupled with a return to the traditional principles of mitigation. (Notes of the Staff of the State Commission on Revision of the Penal Law and Criminal Code, 1967 Gilbert, Criminal Law and Practice of New York, pp 1C-1, 1C-61—1C-62.) The Commission also replaced the traditional language of "heat of passion", with a new formulation, "extreme emotional disturbance". In this respect, the Commission adopted the manslaughter provisions in the Model Penal Code. (Model Penal Code, § 201.3 [subd (1) par (b)].) This change was designed to avoid limiting mitigation to the situation where a defendant, provoked, acts "under the influence of some sudden and uncontrollable emotion excited by the final culmination of * * * misfortunes * * * * *" (*People* v. *Caruso*, 246 NY 437, 446.) The new formulation does not impose so arbitrary a limit on the nature of circumstances that might justify a mitigation. (Model Penal Code, § 201.3, Comment, pp 46-47 [Tent. Draft No. 9].)

The original 1964 proposal of the Commission did not, as the Model Penal Code does not, expressly state that the burden of establishing mitigating circumstance is upon the defendant. To clarify the situation, the 1965 proposal, ultimately enacted, made extreme emotional disturbance an affirmative defense to be proved by the defendant. The 1965 bill made no other substantive changes. (Fourth Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. 1965, No. 25, pp 29-30.)

The present Penal Law thus provides that it is an affirmative defense to a murder prosecution that the "defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse * * * * *" (Penal Law, § 125.25 [subd (1), par (a)].) The defense must be

established by a preponderance of the evidence. (Penal Law, § 25.00 [subd (2)].) If the defense proves successful, the defendant may not be found guilty of the crime of murder, but only of the crime of manslaughter in the first degree. (Penal Law, § 125.20 [subd 2].) The sentences that might be imposed for these crimes differ significantly. (See Penal Law, § 70.00.)

We conclude that the New York statutes do not infringe the due process interests which *Mullaney* v. *Wilbur* (421 US 684, *supra*) sought to protect. The Due Process clause of the Federal Constitution requires that a conviction cannot be had unless the prosecution proves beyond a reasonable doubt "every fact necessary to constitute the crime" with which a defendant is charged. (*In re Winship*, 397 US 358, 364.) In New York, the prosecution in order to obtain a conviction for murder, must prove beyond a reasonable doubt that the defendant, with intent to cause the death of another person, did cause the death of such person or of a third person. (Penal Law, § 125.25 [subd 1].) With respect to intent, the People must establish that the defendant's conscious objective was to cause the death of the other person. (Penal Law, § 15.05 [subd 1].) Intent may not be inferred from the simple fact of killing, but must be proved by other facts. That New York will permit the defendant to establish the existence of mitigating circumstances, collateral to the principal facts at issue, does not detract in the smallest degree from the rule, long established in this State, that the prosecution must prove intent beyond a reasonable doubt.

The law of Maine, under consideration in *Mullaney*, did not make the "facts of intent" general elements of the crime of felonious homicide. (421 US at p 699.) Rather, the degree of intent was relevant only to punishment. (*Id.*) Even then, the prosecution was permitted to rely upon a presumption of malice, to be drawn from the fact of a killing. If the defendant acted under the heat of passion on sudden provocation, malice afore-

though was negated since, under Maine law, as well as under the common law, malice and heat of passion are mutually inconsistent. (421 US at pp 686-687.) That is to say, if the defendant's mind was possessed by malice, his actions could not have resulted from an inflamed passion aroused by a sudden provocation. Under Maine law, malice and heat of passion are reflective of the defendant's intent, and the state could not constitutionally provide the prosecution with a presumption of malice and then require the defendant to negate it with proof that he acted under the heat of passion. (421 US at p 702.)

In New York, the prosecution is at all times required to prove, beyond a reasonable doubt, the facts bearing the defendant's intent. That the defendant acted because of an extreme emotional disturbance does not negate intent. The influence of an extreme emotional disturbance explains the defendant's intentional action, but does not make the action any less intentional. The purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them. (See Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1446, *supra*.) The opportunity opened for mitigation differs significantly from the traditional heat of passion defense. Traditionally, an action taken under the heat of passion meant that the defendant had been provoked to the point that his "hot blood" prevented him from reflecting upon his actions. (See, e.g., *People* v. *Ferraro*, 161 NY 365, 375.) Furthermore, the action had to be immediate, for if there was time for "cooling off", there could be no heat of passion. (See, e.g., *People* v. *Fiorentino*, 197 NY 560, 563.) An action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a

defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore. The differences between the present New York statute and its predecessor and its ancient Maine analogue can be explained by the tremendous advances made in psychology since 1881 and a willingness on the part of the courts, legislators, and the public to reduce the level of responsibility imposed on those whose capacity has been diminished by mental trauma. It is consistent with modern criminological thought to reduce the defendant's criminal liability upon proof of mitigating circumstances which render his conduct less blameworthy. So long as the prosecution must prove, beyond a reasonable doubt, that the defendant intended to kill his victim, it is not a violation of due process to permit the defendant to establish he formulated his intent while "under the influence of extreme emotional disturbance."

Our dissenting brethren would draw a contrary conclusion based upon a broad reading of selected portions of the *Mullaney* opinion. We recognize that some of the language in *Mullaney* might, by a process of extrapolation, be applied to the provisions of the New York Penal Law. To be sure, the issue is not free from doubt. Yet it must also be recognized that judicial opinions are not written and rendered in the abstract. Language is given its meaning by the context which compels its writing. It is basic to our common law system that a court decides only the case before it. While the Supreme Court in *Mullaney* struck down the Maine law of homicide, it did not reach out and pass on the constitutional validity of every state criminal statute that contains either an affirmative defense or a policy presumption. We believe, from our review of the history and development of the New York law of homicide, that New York homicide law differs significantly from the homicide law of Maine. In our view, this essential difference makes this case materially distinct

from that presented to the Supreme Court in *Mullaney*. For this reason, we do not believe that *Mullaney* mandates a holding that the affirmative defense of extreme emotional disturbance is unconstitutional (See *Mitchell* v. *W.T. Grant Company*, 416 U.S. 600 at 615). Our law does not deprive the defendant in a murder prosecution of due process of law. We also believe, for the reasons stated by Chief Judge Breitel in his concurring opinion, that the concept of affirmative defenses is sound, valuable and is one that has a place in modern penal law. We hold, therefore, that the provisions of the New York Penal Law which set forth the affirmative defense of extreme emotional disturbance are not constitutionally infirm.

The issue of whether Gordon Patterson's actions were committed under the influence of an extreme emotional disturbance was squarely presented to the jury. Although the People did not controvert the testimony of the defense psychiatrist, the jury was free to refuse to credit that testimony and to conclude, from the other evidence in the case, that the defendant had not established that his intent was formulated under the influence of an extreme mental trauma. The jury concluded that the defendant was not entitled to the mitigation permitted by statute and, on appeal to our court, from an affirmance by an intermediate appellate court, this finding is not reviewable by us. (See, e.g., *People* v. *Eisenberg*, 22 NY2d 99, 101.)

We turn now to the issue of whether Roberta Patterson, the defendant's wife, was properly permitted to testify as to the facts of the shooting and the conversation with the defendant during the ride from the scene of the crime. Although the Pattersons were, and are still, legally married to each other, the actions and words of the defendant were not protected by the marital privilege. (CPLR 4502.) Immediately after the shooting, the defendant attempted to strangle his wife. After releasing his grip

on her, he ordered her about with a rifle still clutched in his hands. "This is strong evidence that defendant himself was not then relying upon any confidential relationship to preserve the secrecy of his acts and words * * * * *" (*People* v. *Dudley*, 24 NY2d 410, 415.)

As to the other contentions advanced by the defendant, we find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed.

BREITEL, Ch. J. (concurring):

I am in complete agreement with the views expressed in the majority opinion and therefore concur in it. It seems apt, however, to add some comments respecting the salutary criminological purposes served by the development of affirmative defenses, even where the burden of proof rests on the defendant.

A preliminary caveat is indicated. It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime. Indeed, a by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf.

Nevertheless, although one should guard against such abuses, it may be misguised, out of excess caution, to forestall or discourage the use of affirmative defenses, where defendant may have the burden of proof but no greater than by a preponderance of the evidence. In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the

adjustment between offenses of lesser and greater degree. In times when there is also a retrogessive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.

The affirmative defense, intelligently used, permits the gradation of offenses at the earlier stages of prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove, if he can, the distinction between the offense charged and the mitigating circumstances which should ameliorate the degree or kind of offense. The instant homicide case is a good example. Absent the affirmative defense, the crime of murder or manslaughter could legislatively be defined simply to require an intent to kill, unaffected by the spontaneity with which that intent is formed or the provocative or mitigating circumstances which should legally or morally lower the grade of crime. The placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the "element" of mitigating circumstances is generally unfair, especially since the conclusion that the negative of the circumstances is necessarily a product of definitional and therefore circular reasoning, and is easily avoided by the likely legislative practice mentioned earlier.

The problems involved and their resolution are, of course, not confined to the crimes of homicide but extend to most serious offenses and some minor ones.

In a more mature and developed criminology sophisticated distinctions should be used freely, guarding only for abuse. The goals are more appropriate definition of and sanctions for crime, and a retreat from primitive notions about crime based on a result alone or based largely on result. "A homicide is a

homicide is a homicide" is not a truth of modern criminology and such a simplistic approach, which could be encouraged by making affirmative defenses unattractive to legislators, is not one to be followed.

The treatment of entrapment as an affirmative defense in the Model Penal Code is particularly illustrative of the discussion (A.L.I. Model Penal Code, Tent. Draft No. 9 [1959], §2.10, subd [2] and Comments at pp 14-24). The trial was followed in this State with the enactment of the new Penal Law, to introduce what had not been in this State the ameliorative entrapment defense before (see §40.05, enacted as §35.40 by L. 1965, ch. 1030, and renumbered §40.05 by L. 1968, ch. 73, §11, with the burden of proof on defendant, §25.00, subd 2; *People* v. *Laietta*, 30 NY2d 68, 73-75, cert. den. 407 US 923). Given the resistance in many places in the Legislature and even in the American Law Institute it is a fair conjecture that but for the affirmative defense *cum* burden of proof treatment, the law would not have followed this course (see Hechtman, Practice Commentaries to Penal Law § 25.00, McKinney's Consol. Laws of N.Y., Book 39, at pp 62-63; A.L.I. Model Penal Code, Tent, Draft No. 4 [1955], Comments to § 1.13, at pp 108-114, esp. p 113). In short, only those with a lack of historical perspective would treat the affirmative defense as a hardening of attitudes in law enforcement rather than as a civilized and sophisticated amelioration.

In sum, the appropriate use of affirmative defenses enlarges the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around — a shift from primitive mechanical classifications based on the bare anti-social act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, the mark of an advanced criminology.

JONES, J. (concurring):

I concur in the majority opinion.

In my view respect for the proper role of the legislative branch calls for the exercise of responsible judicial constraint in this case. Our Legislature has carefully and thoughtfully revised our State's Penal Law. In that process recourse was had to the recasting as an affirmative defense of what is now termed "extreme emotional disturbance". As is stated in the concurring opinion of the Chief Judge, the intelligent use of affirmative defenses makes eminently sound sense in the criminal law today. Thus, I am not prepared in the discharge of what I conceive to be my judicial responsibility and discipline to strike down the provision here under review because on one analysis the opinion of the United States Supreme Court in *Mullaney* v *Wilbur*, 421 US 684, would appear to call for that result. Another reading of the same opinion leads others to a different conclusion. In that circumstance, I conclude that, until there has been an explicit determination by the Supreme Court which permits us no alternative, it serves better in this case to leave to that Court the articulation of its views than for me to assume to interpret them, particularly where experience has demonstrated that my own judgment in such matters is not infallible. (Cf. *People* v *La Ruffa*, 37 NY2d 58, 62 [my concurring opinion], cert. den. 44 USLW ——; *Menna* v *New York*, 44 USLW 3304.)

COOKE, J. (dissenting):

I dissent and vote to reverse the order of the Appellate Division and to grant a new trial, on the authority of *Mullaney* v *Wilbur* (421 US 684).

Defendant was indicted and convicted after a jury trial of the crime of murder. The indictment, returned on January 15,

1971, accused "the defendant of the crime of MURDER, committed as follows: The defendant on the 27th day of December, 1970, in the Town of Urbana, County of Steuben and State of New York, did knowingly and unlawfully and with the intent to cause the death of another person, did cause the death of another person, to wit: the defendant on the aforesaid date at the Robert Rook residence in the Town of Urbana, New York, did intentionally cause the death of John Northrup by intentionally firing at John Northrup a loaded firearm thereby inflicting wounds which caused the death of said John Northrup."

The pivotal question on which this appeal turns is whether or not the New York murder statute in effect at the time of the commission of the alleged crime and at the time of trial (Penal Law, §125.25, subd 1; see ch 1030, L 1965, eff Sept. 1, 1967), which made the defense of extreme emotional disturbance an affirmative defense, violated the due process clause of the Fourteenth Amendment.

Under the old Penal Law in effect prior to September 1, 1967, there were two degrees of murder, first degree murder being distinguished from murder in the second degree by the presence of premeditation and deliberation. Section 1044 of the former Penal Law, defining murder in the first degree, provided:

> The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:
>
> 1. From a deliberate and premeditated design to effect the death of the person killed, or of another;
>
> * * *

and section 1046, furnishing the second degree definition, stated:

> Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

The revised Penal Law, as originally enacted by chapter 1030 of the Laws of 1965 and which became effective September 1, 1967, not only abandoned the degrees of murder but also eliminated the elements of premeditation and deliberation. In this respect, homicidal intent alone became the prerequisite for murder (Rothblatt, Criminal Law of New York, The Revised Penal Law, §68).

Subdivision 1 of section 125.25 of the revised Penal Law, as in effect at the time in question,[1] provided in part:

> A person is guilty of murder when:
>
> 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:
>
> (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; * * *.

---

[1] Pursuant to section 4 of chapter 367 of the Laws of 1974, effective September 1, 1974, the words "in the second degree" were added to the section title, the introductory line and the last unnumbered paragraph of section 125.25. Pursuant to section 13 of chapter 276 of the Laws of 1973, effective September 1, 1973, "A-I" were substituted for "A". Pursuant to section 5 of chapter 367 of the Laws of 1974, effective September 1, 1974, section 125.27, entitled "Murder in the first degree", was added to the Penal Law.

It should be noted that the absence of extreme emotional disturbance is not one of the elements of this type of such a crime; rather, such a disturbance is made an affirmative defense. Under this statute murder is a class A felony punishable by life imprisonment (Penal Law, §70.00 [2] [a]).

Section 125.20 of the revised Penal Law, defining manslaughter in the first degree, reads in part:

> A person is guilty of manslaughter in the first degree when:
>
> * * *
>
> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; * * *.

Attention is called to the fact that under the statute the People need not prove "under the influence of extreme emotional disturbance" in any prosecution under subdivision 2 of section 125.20. Manslaughter in the first degree is defined as a class B felony, punishable by 25 years imprisonment (Penal Law, § 70.00 [2] [b].

The statute, subdivision 2 of section 25.00 of the Penal Law, declares in regard to the burden of proof as to an affirmative defense:

> When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has

> the burden of establishing such defense by a preponderance of the evidence.

Thus, under the statute, the defendant had the burden of establishing, by a preponderance of the evidence, the affirmative defense that he acted under the influence of extreme emotional disturbance. Here, the trial court charged that defendant had raised the affirmative defense of "extreme emotional disturbance" and read subdivision 2 of section 25.00 to the jury. It instructed the jury that:

> In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you both that he was so emotionally influenced, and that it is a reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence.

After this case was tried and subsequent to the Appellate Division affirmance, the Supreme Court, on June 9, 1975, rendered its decision in *Mullaney* v *Wilbur* (421 US 684). It is determinative here. It must be given complete retroactive effect, since the major purpose of its constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function (*Ivan V.* v *City of New York*, 407 US 203; cf. *United States ex rel. Castro* v *Regan*, 525 F2d 1157, 1158).

In *Mullaney*, defendant was found guilty of murder after a trial in the State of Maine. The case against him included his pretrial statement in which he claimed that he attacked the

victim in a frenzy provoked by the victim's homosexual advances. The defense argued that the homicide was not unlawful since defendant lacked criminal intent and, alternatively, that at most the homicide was manslaughter rather than murder since it occurred in the heat of passion provoked by the homosexual assault. The trial court instructed the jury that Maine law recognizes only two kinds of homicide, murder and manslaughter, the common elements of both being that the homicide be unlawful, that is, neither justifiable or excusable, and that it be intentional. After reading the statutory definitions of murder and manslaughter, the court charged that "malice aforethought is an essential and indispensable element of the crime of murder", without which the homicide would be manslaughter. The jury was further instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. It was emphasized that "malice aforethought and heat of passion on sudden provocation are inconsistent things" and, thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter.

The Maine murder statute (Me Rev State, Tit 17, §2651) provides:

> Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.

The manslaughter statute (Tit 17, §2551), in relevant part, reads:

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought * * * shall be punished by

a fine of not more than $1,000 or by imprisonment for not more than 20 years * * *.

The Supreme Court in *Mullaney*, at page 691, viewed these Maine statutes in this fashion:

> The Maine law of homicide, as it bears on this case, can be stated succinctly: Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder — *i.e.*, by life imprisonment — *unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation*, in which case it is punished as manslaughter — *i.e.*, by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years (emphasis added).

After tracing the development of the law relating to homicide for several centuries and noting that in the last fifty years the large majority of the states have required the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt, the Supreme Court observed at page 696:

> This historical review establishes two important points. First, the fact at issue here — the presence or absence of the heat of passion on sudden provocation — has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.

In response to the argument that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant, the Supreme Court was quick to point out at page 701:

> No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential.

After laying down these premises, it comes as no surprise that the Supreme Court terminated its *Mullaney* dissertation, at page 704, with this conclusion:

> We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

That the New York statutes in question (Penal Law, §§125.20 [subd 2]; 125.25 [subd 1]) are virtually the same as the Maine law of homicide, is apparent from the Supreme Court's "succinct statement" of the latter in *Mullaney* at page 691. New York's phrase of "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse" is but a replacement for the phrase "in the heat of passion". This is demonstrated by Hechtman's Practice Commentaries (McKinney's Cons. Laws, Book 39, §125.20, pp 391, 393) in which it is stated *inter alia*:

> The meanings and significance of subdivisions 1 and 2 can be fully appreciated only against a background of certain common law principles of homicide.
>
> The common law enunciates the seemingly sound doctrine, known as "voluntary manslaughter" and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed "heat of passion," "sudden passion," "provocation," and the like (1 Warren on Homicide [Perm. Ed.] §85, pp. 416-417). The theory of the principle is one of extending a degree

> of mercy to a defendant who, though intending to kill, acted out of some kind of emotional disturbance rather than in cold blood.
>
> * * *

Subdivision 2, in conjunction with a provision of the revised murder statute (§125.25 [1a]), restores to New York the aforementioned common law doctrine of reduction from murder to manslaughter on the basis of "heat of passion." In the restoration process, however, the phrase "in the heat of passion" is abandoned as the criterion of mitigation in favor of the phrase, "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse" (§125.25 [1a]). The latter standard is adopted from the Model Penal Code of the American Law Institute (§210.3 [b]), and the reasons prompting this change are fully expounded in the Institute's commentaries (Model Penal Code Commentary, Tent Draft No. 9, pp. 28-29).

Moreover, as the Supreme Court pointed out in *Mullaney*, the "malice aforethought" specified in Maine's murder statute was not an element requiring objective proof but only a policy presumption of the absence of heat of passion (Id. at 694). While New York's statutes do not mention malice as such, they make the absence of extreme emotional distress an element of murder by distinguishing manslaughter from murder only by the presence of extreme emotional distress. Thus nothing turns on the fact that Maine gives this absence of the emotional factor a name and New York does not. Although not an element of the crime, said absence is the sole factor which determines whether the defendant will be convicted of murder or manslaughter and whether he will be subject to a maximum sentence of life or 25 years imprisonment. Functionally, the two statutory schemes are identical. The Supreme Court said of this design that it would permit a state to:

> undermine many of the interests that decision [*Winship*] sought to protect without effecting any substantive

> *change in the law. It* would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. (421 US at 698.)

Under *Mullaney*, there is no alternative but to hold that the provision in subdivision 1 of section 125.25 of the Penal Law, which makes the contention that defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse an affirmative defense, with the burden of proof upon defendant to establish said defense by a preponderance of the evidence, unconstitutional as a violation of the due process provision of the Fourteenth Amendment. The record here, relating to defendant's mental state at the time of the killing, required a charge that to establish defendant's guilt of murder the prosecution had the burden of proving that defendant was not acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. In *United States ex rel. Castro* v *Regan* (525 F2d 1157, *supra*), it was stated at page 1160:

> No where did the court charge, as did the Maine court in *Mullaney*, that the defendant had the burden of "establish[ing] by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." * * * Rather, the court charged that, before the jury could find murder in the second degree, "there has to be proof beyond a reasonable doubt that there was the unlawful killing of another human being with malice and without reasonable provocation or justifiable cause or excuse."

Under such a charge, defendant had nothing to prove and the burden was kept where it belonged.

See: *People* v *Davis* (49 AD2d 437); *People* v *Woods* (84 Misc2d 301; *People* v *Balogun* (82 Misc2d 907). See also, *Evans* v *State* (28 Md App 640).

Opinion of The New York Court of Appeals

It is significant that, although the Appellate Division affirmed the judgment of conviction in this case before the Supreme Court handed down its decision in *Mullaney*, that same Appellate Division, creditably, changed its position in *People* v *Davis* (*supra*) when that case came to it after *Mullaney*.

The order of the Appellate Division should be reversed and a new trial granted.

* * * * * * * *

Order affirmed. Opinion by Jasen, J. Concur: Breitel, Ch. J., Gabrielli and Jones, JJ., Breitel, Ch. J., and Jones, J., in separate concurring opinions. Cooke, J., dissents and votes to reverse in an opinion in which Wachtler and Fuchsberg, JJ., concur.

Decided April 1, 1976

APPENDIX B

REMITTITUR

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of January in the year of our Lord one thousand nine hundred and seventy-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES D. BREITEL,
Chief Judge, *Presiding.*

JOSEPH W. BELLACOSA, Clerk

REMITTITUR April 1, 1976

4 No.

The People &c.,

Respondent,

vs.

Gordon G. Patterson, Jr.,

Appellant.

Be it Remembered, That on the 28th day of November in the year of our Lord one thousand nine hundred and seventy-five, Gordon G. Patterson, Jr., the appellant in this cause, came here unto the Court of Appeals, by Betty D. Friedlander, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And the

Remittitur

People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by John M. Finnerty, Dist. Atty. for Steuben County, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Therefore, it is considered that the said order is affirmed &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Steuben County Court before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Steuben County Court before the Judge thereof, &c.

/s/ JOSEPH W. BELLACOSA
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 1, 1976.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

/s/ JOSEPH W. BELLACOSA
Clerk.

Whereupon, The said Court of Appeals having heard this cause argued by Ms. Betty D. Friedlander of counsel for the appellant, and by Mr. John M. Finnerty of counsel for the respondent, and after due deliberation had thereon, did order

Remittitur

and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. Opinion by Jasen, J. Concur: Breitel, Ch. J., Gabrielli and Jones, JJ. Breitel, Ch. J., and Jones, J., in separate concurring opinions. Cooke, J., dissents and votes to reverse in an opinion in which Wachtler and Fuchsberg, JJ., concur.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Steuben County Court there to be proceeded upon according to law.

State of New York
County of Steuben ss:

I, Chilton Latham, Clerk of the County of Steuben, and also Clerk of the County and Supreme Courts therein, both being Courts of Record, having a common seal, do hereby certify that I have compared the foregoing copy of Remittitur with the original of the same now remaining in my office and that it is a correct transcript therefrom and the whole of said original.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Bath, N.Y., this 20th day of April A.D., 1976.

/s/ CHILTON LATHAM
Clerk

(SEAL)

ORDER OF HON. M.E. TILLMAN

Index No. 30,538

FILED
May 17 1:40 PM '76
STEUBEN COUNTY
CLERK'S OFFICE

STATE OF NEW YORK
COUNTY COURT: COUNTY OF STEUBEN

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

GORDON G. PATTERSON,

Defendant.

Present: Hon. M.E. Tillman, Acting County Court Judge

The above-mentioned defendant having appealed to the Court of Appeals from the order of the Appellate Division of this court, Fourth Department, entered on the 18th day of May, 1973 in the office of the clerk of such court, and the Court of Appeals having heard said appeal and ordered and adjudged that the order so appealed from be affirmed, and judgment entered against the defendant, and the remittitur from the Court of Appeals having been filed in the office of the clerk of Steuben County,

NOW, on motion of Betty D. Friedlander, Esq., attorney for the defendant, it is

ORDERED that the said judgment of the Court of Appeals be, and the same hereby is made the judgment of this court, and that the judgment entered herein on the 6th day of July, 1971,

be, and the same hereby is affirmed, and that a judgment of this court be entered herein affirming said judgment.

Signed this 11th day of May, 1976 at Corning, New York.

Enter

/s/ M.E. TILLMAN
Acting County Court Judge
Steuben County

ENTERED
MAY 17 1:40 PM '76
STEUBEN COUNTY
CLERK'S OFFICE

JUDGMENT

STATE OF NEW YORK
COUNTY COURT: COUNTY OF STEUBEN

PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs

against

GORDON G. PATTERSON,

Defendant.

The above-named defendant having appealed to the Court of Appeals from an order of the Appellate Division of this court, Fourth Judicial Department, entered in this action on the 18th day of May, 1973, affirming the judgment entered therein on the 6th day of July, 1971, in the office of the clerk of Steuben County, and the Court of Appeals having heard said appeal, and ordered and adjudged that the order so appealed from be af-

Judgment

firmed and judgment rendered against the defendant, and the remittitur from the Court of Appeals having been filed in the office of the clerk of Steuben County, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this court, and directing the entry of a judgment of affirmance herein,

Now, on motion of Betty D. Friedlander, Esq., attorney for defendant,

It is adjudged that the judgment in this action entered on the 6th day of July, 1971, be and the same hereby is affirmed, and that the defendant be found guilty of the crime of murder.

Judgment signed this 17th day of May, 1976.

/s/ CHILTON LATHAM
Clerk, Steuben County

State of New York
County of Steuben ss:

I, Chilton Latham, Clerk of the County of Steuben, and also Clerk of the County and Supreme Courts therein, both being Courts of Record, having a common seal, do hereby certify that I have compared the foregoing copy of Order with the original of the same now remaining in my office and that it is a correct transcript therefrom and the whole of said original.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Bath, N.Y., this 17th day of May A.D., 1976.

/s/ CHILTON LATHAM, Clerk

(SEAL)

APPENDIX C

NOTICE OF APPEAL

STATE OF NEW YORK
COUNTY COURT: COUNTY OF STEUBEN

GORDON G. PATTERSON, JR.,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Indictment No. 3273

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Gordon G. Patterson, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the New York Court of Appeals, entered on April 1, 1976, affirming the order of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, entered on May 18, 1973, affirming the judgment of conviction of murder, entered in the Steuben County Court on July 6, 1971.

This appeal is taken pursuant to 28 U.S.C.A. §1257, subparagraph (2).

DATED: May 25, 1976

/s/ BETTY D. FRIEDLANDER
Office and P.O. Address
The Clinton House
103 West Seneca Street
Ithaca, New York 14850
Phone: 607—273-2156

Notice of Appeal

VICTOR J. RUBINO
Office and P.O. Address
280 Park Avenue
New York, New York 10017
Phone: 212—697-6800

Counsel for Appellant.

TO: Hon. John M. Finnerty
District Attorney
Steuben County
Bath, New York

Chilton Latham, Clerk
Steuben County Clerk's Office
Bath, New York

Hon. Louis J. Lefkowitz
New York State Attorney General
The Capitol
Albany, New York 12224

Hon. Joseph Bellacosa, Clerk
Court of Appeals
Court of Appeals Hall
Eagle Street
Albany, New York 12207

CERTIFICATE OF SERVICE OMITTED IN PRINTING

APPENDIX D

STATUTES INVOLVED

The full verbatim text of the State statutes involved follows:

§ 25.00 Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law p. 62.

§ 70.00 Sentence of imprisonment for felony

1. Indeterminate sentence. Except as provided in subdivision four, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

(a) For a class A felony, the term shall be life imprisonment;

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;

(c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and

(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(a) In the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence. *

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years.

(ii) For a class A-II felony, such minimum period shall not be less than six years nor more than eight years four months.

(iii) For a class A-III felony such minimum period shall not be less than one year nor more than eight years four months;

(b) Where the sentence is for a class B, class C or class D felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that the ends of justice and best interests of the public require that the court fix a minimum period of imprisonment, the court may fix the

*Pursuant to chapter 276 of the Laws of 1973, effective 9/1/73, the words "For a class A-I Felony" were inserted as subparagraph (i) in paragraph (a) of Subdivision 3, and subparagraphs (ii) and (iii) were added. This works no change in the punishment for conviction under Penal Law, Section 125.25 as it existed when Appellant was convicted in 1971.

minimum period. In such event, the minimum period shall be specified in the sentence and shall not be more than one-third of the maximum term imposed. When the minimum period of imprisonment is fixed pursuant to this paragraph, the court shall set forth in the record the reasons for its action; and

(c) In any other case, the minimum period of imprisonment shall be fixed by the state board of parole in accordance with the provisions of the correction law.

4. Alternative definite sentence for class D or E felony. When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law pp. 194-196.

§ 125.00 Homicide defined

Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law p. 370.

Statutes Involved

§ 125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or

3. He commits upon a female pregnant for more than twenty-four weeks an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Manslaughter in the first degree is a class B felony.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law pp. 390, 391.

Statutes Involved

§ 125.25 Murder in the second degree *

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates

---

*Pursuant to section 4 of chapter 367 of the Laws of 1974, effective September 1, 1974, the words "in the second degree" were added to the section title, the introductory line and the last unnumbered paragraph of section 125.25. Pursuant to section 13 of chapter 276 of the Laws of 1973, effective September 1, 1973, "A-1" were substituted for "A". Pursuant to section 5 of chapter 367 of the Laws of 1974, effective September 1, 1974, section 125.27, entitled "Murder in the first degree", was added to the Penal Law. These changes were made after Appellant's conviction in 1971, but the majority opinion in the Court of Appeals stated explicitly that there were no substantive changes in the relevant statutes (A.13 F.N.6)

a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder in the second degree is a class A-I felony.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law pp. 396-398.

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1861

GORDON G. PATTERSON, JR.,
Appellant

—*v.*—

PEOPLE OF THE STATE OF NEW YORK

ON APPEAL FROM THE
NEW YORK COURT OF APPEALS

Jurisdictional Statement Filed June 24, 1976
Probable Jurisdiction Noted October 4, 1976

Daily Record Corporation
Rochester, New York

(2398)

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Syracuse, New York

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In The

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—*v.*—

PEOPLE OF THE STATE OF NEW YORK

ON APPEAL FROM THE
NEW YORK COURT OF APPEALS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 15, 1971	Indictment Returned
July 6, 1971	Judgment of Conviction Entered in Steuben County Court
April 1, 1976	Judgment of Conviction Affirmed in New York Court of Appeals

INDICTMENT

STATE OF NEW YORK
COUNTY COURT — STEUBEN COUNTY

PEOPLE OF THE STATE OF NEW YORK

—against—

GORDON G. PATTERSON, JR.

The Grand Jury of the County of Steuben by this indictment accuse the defendant of the crime of murder committed as follows:

The defendant on the 27th day of December, 1970, in the Town of Urbana, County of Steuben and State of New York, did knowingly and unlawfully and with the intent to cause the death of another person, did cause the death of another person, to wit the defendant on the aforesaid date at the Robert Rooks residence in the Town of Urbana, New York did intentionally cause the death of John Northrup by intentionally firing at John Northrup a loaded firearm thereby inflicting wounds which caused the death of said John Northrup.

January 15, 1971

DONALD PURPLE
District Attorney
Steuben County

TESTIMONY

STATE OF NEW YORK
COUNTY COURT — STEUBEN COUNTY

(Title Omitted In Printing)

* * *

[984]

WILLIAM LIBERTSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KNAPP:

Q. Doctor, where do you live at the present time, sir?

A. In Pittsford, New York, a suburb of Rochester.

Q. It is my understanding, sir, that you are a medical doctor licensed to practice in the State of New York?

A. Yes, sir.

Q. Could you give us, Doctor, the schools that you attended
[985]
and the degrees that you may have obtained prior to being licensed as a physician in the State of New York?

A. I graduated from Royal College of Physicians and Surgeons in London, England, in 1935. I did post-graduate work in medicine in Columbia University after I received my M.D. degree. I interned for two years and then became licensed in New York State. I have been practicing medicine ever since.

Q. What year was it, Doctor, that you became licensed?

A. 1937.

Q. Now, I understand that you practiced originally in New York City, sir?

A. No, I did my internship in New York City.

[986]

Q. And where did you first commence practicing medicine?

A. I did my residency in psychiatry at Rochester State Hospital. I have been in Rochester since 1937.

Q. And are you presently associated with any hospitals in this area?

A. I am on the staff of every hospital in Rochester except the Rochester General Hospital, which is too far for me to go.

I am consulting psychiatrist at four or five hospitals in the neighboring counties — Wayne Community Hospital, for instance, Clifton Springs Hospital and so on.

I am attending psychiatrist at Strong Memorial Hospital, Senior Psychiatrist at the Highland Hospital, Chief of the Division of Psychiatry at St. Mary's Hospital, Assistant Professor of Psychiatry at the University of Rochester.

Q. Are you actually teaching at the present time at the University of Rochester?

A. Yes, sir.

Q. Now, would you tell me what medical societies or associations you may be a member?

A. I belong to the New York State Medical Society, American

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Medical Association, the Monroe County Medical Society, obviously. I am a Fellow of the American Psychiatric Association. I am a Fellow of the American Academy of Psychosomatic Medicine. I am a Diplomate of the American Board of Neurology and Psychiatry. I am a Fellow of the American Academy of Forensic Sciences.

Q. Doctor, in regards to the Fellow of the American Academy of Forensic Sciences, could you describe for me the nature of that particular Association in science?

A. This is an organization made up of various sciences whose efforts relate to the law and to the administration of justice. It is the interreaction of science with the law, therefore, to this organization in addition to psychiatrists, you are likely to find forensic pathologists, ballistic experts, forensic toxicologists, any scientific discipline that helps in the search for valid truth of the facts as they relate to the law.

Q. This is similar to a specialty, isn't it? Doctor?

A. Yes, it is a specialty. Forensic psychiatry is my subspecialty.

Q. And you have been active in this specialty for how long?

A. Oh, twenty years.

Q. And has your activity in this particular science made it

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possible for you to testify many times in many Courts?

A. Yes, sir.

Q. And how many times, Doctor, would you say you have testified in a Court of law?

A. Hundreds and hundreds.

Q. Civil cases as well as criminal cases?

A. Civil cases and criminal cases both.

Q. And is this association in this specialty — has that brought you in contact with and required your examination and study of many different individuals involved with the law?

A. Yes, sir, exactly.

Q. Now, Doctor, did you at my request examine the defendant in this case, Gordon Patterson?

A. Yes, sir, I did.

Q. Will you tell us, Doctor, the first time that you examined Mr. Patterson?

A. March 18th, 1971.

Q. And where did this examination take place?

A. In my office in Rochester.

Q. And the location of your office is where?

A. 3700 East Avenue.

Q. Were there present any other persons besides the defendant
[989]
and yourself?

A. Two senior residents, that is, doctors who have had five years of medicine and three years of psychiatric specialty are being tutored in forensic psychiatry by me and with your permission and the defendant's permission they were there in an educational capacity.
[990]

Q. And on that occasion was I also present, Doctor?

A. Yes, sir.

Q. Now, Doctor, did you obtain a history at that time from the defendant?

A. Yes, I went rather extensively into the history.

Q. Do you want to give us that history now, Doctor?

A. Much of it already, Counselor, has been placed in evidence.

Essentially, the young man was born in Elmira, enlisted in the Marines in January, 1968. He was injured twice in Vietnam and discharged June 4, 1970.

The history to which I paid particular attention was his emotional involvement in the war, and, particularly, his emotions the first time he killed a Vietnamese enemy.

Q. On that subject, Doctor, is it my understanding that you voluntarily did some service in Vietnam yourself?

A. Yes, I worked for the Vietnamese Government through USAID the summer before last, the summer the defendant was discharged.

Q. Did this require your attendance in Vietnam itself?

A. Yes, in June, July and August of 1969.

Q. So you do have a firsthand knowledge then of the situation in Vietnam and activities in Vietnam?

A. Firsthand is a good way to put it, yes, sir.
[991]

Q. All right. Doctor, continue, I am sorry.

A. That portion of the history relating to the defendant's emotions, his description of how sick he felt and how shocked he felt and how subsequently, despite his training as a Marine, he had to attempt to reconcile himself to doing something that had to be done, but the reconciliation was not easy. It was a painful thing.

The history of his relationship with the girl he subsequently married was gone into very extensively, with particular emphasis on the disagreements, further emphasis on the relationship by which he felt taunted and degraded, the many angry outbursts, the frequent losses of control that I heard him describe here in the courtroom this morning, the episodes when

he simply lost control on the basis of being goaded, and the stockings, so on.

The most shocking, to him, portion of the history was the incident in mid-December when he found his wife in bed or in a compromising situation, and his emotions on that occasion reached almost explosive levels.

I use the word "explosive," because this type of personality frequently does explode given sufficient provocation, and the explosion is associated with defective ability to perceive, to remember, to understand

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exactly what is going on, and this is called an explosive personality, with an explosive burst of emotionality. It does not matter whether the explosive emotion is anger or hatred or love or disgust or shock. Such a person, and this defendant particularly, does react in this explosive way.

The incident of the shooting was, I felt, adequately described here this morning. When I interrogated the defendant in my office, my interrogation associated with the loading of the rifle, automatic behavior of American and South Vietnam soldiers I have seen who do these things quite automatically in a self-protective and in a militarily aggressive way without knowing they are doing it, — running and loading at the same time is not necessarily associated with conscious memory. Self protectiveness in a very dangerous situation, whether the situation is a danger to one's life or a danger to one's integrity, one's concept of one's self, frequently is associated with what I have just described, and it applies quite accurately to the defendant.

[993]

A. (Continuing)

The entrance into the room and the shooting of the gun, a set of automatic movements, his accuracy was astounding to me, the accuracy with which the bullets hit their target.

Part of my history was reading the Grand Jury minutes. May I go into that?

Q. Sure.

A. Because there is a little conflict insofar as my knowledge is concerned.

After the shooting and he had his hands around his wife's neck. He tells me that he said, "I love you, repent."

The Grand Jury minutes report something other than that and I believe it is, "Repent. Do you love me?"

I think that is accurate. Correct me if it isn't, Counsellor.

The emotions that the defendant felt at that point plus his coming to, so to speak, finding his wife blue faced, it is the coming to procedure that is of particular significance to the psychiatrist and this entire incident probably took fifteen or twenty seconds, maybe even less, because with one's hands around a person's neck, as with

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any blocked airway, one can become pretty purple due to lack of oxygen within fifteen or twenty seconds.

At any rate, I think that was a very brief period.

One important part of the history to me was the impact of the sermon on this particular individual. When one takes this into interrelationship with the subsequent, rather peculiar, but understandable incident of his wife and he praying for the soul, I

presume, of the dead person. I don't think that one can see the sermon without taking that subsequent event into consideration, so the sermon which you have heard which contains within it much about love and life and death, sacrifice, had, in my opinion, a great impact on that fatal day.

I repeatedly asked the defendant in my office in my attempt to break things down second by second to see whether it was possible to recapture more memory than he told me and it was not. I failed to get any more than that, "I laid in bed trying to think what happened."

He said this innumerable times, always stressing the automatic nature of his actions, but always stressing the intense emotions that he felt. What he so repeatedly called being, "upset," which, I think, is a bad word, but he uses it none the less.

[995]

In my office the definition of the word, "upset" included within it panic, fear, disgust, anger, hatred, all of these other emotions are part of the definition of the word, "upset."

The saga of the drive ultimately leading up to his surrender, giving himself up requires no repetition.

Basically, that is the history that I got in that session.

Q. And in addition to that history, Doctor, did you have an opportunity to talk with Roberta Patterson, the wife of the defendant?

A. Yes. I not only interviewed Mrs. Patterson, but I should amplify on the word, "history," since when the doctor gets history they get historical matter from a lot of different sources. Mrs. Patterson was one source. The military records was another source. The report of Dr. Feldman, Psychiatrist for the Bath Veteran's Administration, was another source of history. Particularly the interesting information that on December 11,

1970, the subject had called the Veteran's Hospital at Bath seeking an appointment.

Part of my history was material that was objected to in the evidence this morning.

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Q. I was going to ask you, Doctor, did you as a matter of fact listen to the tapes that have been marked Exhibits H, I and J?

A. Yes, that is what I referred to.

Q. And did you understand that the defendant had in fact replayed the tapes to himself — I wondered if you were able to hear that?

A. A very important feature of the case, which I am willing to talk about if I am permitted.

Q. You feel that they have some significance, Doctor, in this situation?

A. The play-back to himself?

Q. Yes, and what is on the tapes.

A. Yes. the play-back to himself repeatedly, at least these telephone calls, was a form of self-torture and self-punishment of this very very eloquent sum and substance that interested me, the rejection, his wife rejecting him constantly.

MR. FINNERTY: I am going to object.

THE COURT: Yes, sustained. The answer is stricken. The jury will ignore that answer.

(BY MR. KNAPP)

Q. Doctor, as far as your discussion of the rejection, could

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you then limit yourself to the actual testimony of the defendant in regards to rejection; do you feel you could do that, Doctor?

A. On the basis of what I heard this morning, yes. There is no question, constantly he was trying to undo the rejection that he was confronted with.

Q. Did you in addition have an opportunity today to talk to the defendant?

A. Yes, I did, in your presence.

Q. Both before he testified and after he testified?

A. Yes.

Q. And do you have any additional history that you would care to elaborate on at this time?

[998]

The impact of his wife's rejections, and I now refer to material that he told me in the office, as to material he testified to here — the impact of this constant rejection and the impact of his constantly running back for more punishment led ultimately to such a rising state of emotionality and poor control that he didn't know what he was doing lots and lots and lots of times, and it was on these occasions that he became what he called upset, the word I have tried to define, and the most prominent statement in the entire mental examination is this, "One man is dead because of her. She needs help more than I do."

If one elaborates on this statement, it is not a statement designed to deny his role in using the gun and so on, but simply to describe the constant impact on him of his wife's emotional attacks. That to me would be one of the salient features of the entire case.

Q. Now, Doctor, assume that Gordon Patterson was born in Elmira, New York on the 18th day of May, 1949, of Gordon Patterson, Sr., and Virginia Patterson;

That he spent an average boyhood living in Elmira and Wayne, New York, where he moved with his family in September, 1950;

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That this boyhood was affected by the death of his father on February 4, 1954, and that as a four year-old boy he reacted by crying and refusal to enter the room containing his father's body at the funeral home;

Further assume, Doctor, that he attended 11 years of high school at the Hammondsport Central School, obtaining average grades and participating in normal activities;

That he left further studies to enlist in the United States Marine Corps on January 17, 1968, at the age of 18;

That his military training took place, I believe, at Camp LeJeune and Parris Island and he specialized as a machine gunner;

Further assume, Doctor, that he arrived in Vietnam on July 10, 1968 and was stationed generally in the Da Nang combat zone;

That on July 13, 1968 he was injured by an enemy explosive device, that he suffered multiple facial lacerations and left shoulder shrapnel wounds, with significant conjunctivitis, with accompanying photophobia which occurred as a result of lacerations of the lateral lid and left deltoid area; further numerous small fragments were removed from the corner of both eyes and

[1000]

the eyes were "put to rest," and that the conjunctivitis slowly responded to treatment and therapy;

That following Gordon Patterson's completion of his recuperation, he was flown home as a result of efforts of the Red

Cross, to find that his sister Kathleen Jane Patterson, six years his senior, was suffering from terminal cancer;

That upon learning of his sister's death that he was grief-stricken;

Further assume, Doctor, that he returned to combat duty in the DaNang combat zone and secured a promotion on March 13, 1969; that he was again injured on March 19, 1969, suffering a shrapnel wound of the left side of his chest from an enemy fragment grenade; that the wound was closed on March 24, 1969 but developed secondary infection, requiring hospitalization for 26 days; that he was then returned to duty; that he was discharged effective June 3, 1969, having earned the National Defense Service Medal, the Vietnam Service Medal with one star, the Vietnam Campaign Medal with device, the Purple Heart Medal with one star, and a Good Conduct Medal;

Further assume, Doctor, that upon his return to the Wayne area he secured employment at the Rural Electrifi-
[1001]
cation Association Bath office and that his position was that of a linesman;

That in July, 1969 he became acquainted with a person by the name of Roberta Rooks, who had graduated from Haverling High School in Bath in June, 1969;

That Roberta Rooks did reside on the Cold Springs Road in the Town of Urbana for approximately six or seven years prior to becoming acquainted with Gordon Patterson;

That within three or four dates after becoming acquainted that they became engaged, that this engagement was, in effect, stormy, and that the engagement was broken on several occasions but renewed;

That at the time of the acquaintanceship of Roberta and Gordon Patterson that Roberta was in a pregnant condition by a

person unknown to this particular action, and that after four separations — excuse me — that they did marry, I believe, on January 31, 1970; that there were several separations following this marriage on January 31, the most violent of which was brought about as a result of an argument that occurred at the trailer in which they were then residing, I believe, at the Babcock Hollow Road, but that following a separation of several days and at the request of Gordon Patterson the marriage was again,
[1002]
Roberta did then return and live with Gordon Patterson;

Further assume, Doctor, that following a short residence at the trailer previously mentioned that the couple returned to the home of the defendant Gordon Patterson in the Wayne, New York area and that Roberta and Gordon Patterson resided together until August 5, 1970;
[1003]
Q. (Continuing)

And on August 5th, 1970, a violent argument took place and that as a result of the argument and the actions of both the defendant and Roberta Patterson some injury was sustained by Mrs. Patterson and that, in fact, she did then leave the residence and did return to Cold Springs Road where she had resided until she voluntarily moved into the Village of Bath a few weeks ago.

That the defendant Gordon Patterson did at his own request transfer the location of his employment to, I believe, Cherry Creek, New York, where he continued the same type of employment with the Bath REA as a lineman; that he did have physical contact with his wife, I believe the testimony is, approximately once every three weeks during the period of time from August 5th on and primarily, as I understand it, for the purposes of visiting Todd and Roberta.

That during this period of time the defendant repeatedly requested Roberta Patterson to join him in Cherry Creek in an apartment which he was maintining there.

That in the course of the marriage that Gordon Patterson had become very well acquainted with Roberta's grandmother, Mrs. Rooks, who resides generally in the
[1004]
Cherry Creek area.

That during this period of time prior to December 10th, 1970, the defendant repeatedly requested the return of Roberta Patterson to his residence by phone and at the times when he had personal contact with her.

That these requests were met with a constant refusal to return and in some cases the hanging up of the telephone when this request was made.

Further assume, Doctor, that on December 10th, 1970, the defendant without prior notice to Roberta Patterson did come to the Cold Springs Road home in the Town of Urbana, the residence of Mrs. Patterson's father, her father and mother having previously separated to December 10th and arrived there in the early evening hours and after finding no one in the residence as far as downstairs is concerned, did hear certain noises upstairs, did go up the stairway and entered the bedroom where he found his wife not fully clothed and found a person by the name of John Northrup in bed and not fully clothed and that at that time at least two blows were struck by the defendant against John Northrup and considerable discussion apparently occurred between the three parties; that following this incident a conversation took place between Roberta
[1005]
Patterson and John Northrup and Ann Rooks, which was not overheard by the father, Robert Rooks, but which was attended

by the defendant and following this conversation the defendant did then leave the residence.

Further assume, Doctor, that on December 11th in the morning of that day the defendant did again enter the residence at the Cold Springs Road, the Rooks residence and did have an encounter with Roberta Patterson, during the course of which he did pick up a silk stocking and wrap it around Roberta Patterson's neck, which was not held so tight as to cut off Roberta Patterson's airway, but did have some effect because it was tight and following a few seconds of the silk stocking being around Roberta Patterson's neck the defendant released the pressure on the stocking and for a very few seconds or minutes embraced his wife and told her that he loved her and that he was sorry and that she forgave him.

Assume further, Doctor, that later that same day the defendant was observed and did actually follow Roberta Patterson in a motor vehicle and in that in the course of the events of that morning Mr. Rooks did accompany Roberta Patterson to Roberta's mother's apartment where a conversation was had between Gordon Patterson,
[1006]
the defendant, and Robert Rooks, which Gordon Patterson indicated that he did not know what he could do or how he could solve his problem.

That following this conversation he did go to the residence on Cold Springs Road, the Rooks residence and did destroy certain of Roberta Patterson's clothing and did take certain pictures or a scrapbook which were eventually returned to Roberta Patterson.

That following this incident he again encountered his wife and again still having the silk stocking with him, placed it around Roberta Patterson's neck, again exerting some force but

apparently not sufficient force to cut off Roberta Patterson's airway. Again, within a few seconds he released the pressure and again apologized, again embraced his wife and kissed her.

Following this incident Roberta Patterson did have the defendant arrested for harassment, which charge has never been disposed of.

That on December 15th, 1970, the defendant felt himself in such a condition as to require medical treatment and did call the Veteran's Administration Center in Bath, New York, requesting an appointment with their consulting psychiatrist, but because of the vacation of Dr. Feldman

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the appointment could not be made until January 20th, 1971, which appointment through the cooperation of the Court was kept and Dr. Feldman then saw the defendant, I believe, a week later.

That in addition to this attempt to find psychiatric assistance, the defendant did attempt to arrange for a psychiatric appointment at the Buffalo VA hospital and at the Jamestown Hospital; that in the period of time from December 11th until December 24th there were a series and a number of phone calls and attempts to make phone calls between the defendant Gordon Patterson and Roberta, his wife, to the Northrup residence as well as her own and attempts would be made to locate Roberta Patterson.

That prior to December 10th and after the 10th the defendant himself did make tape records of some of these conversations and did play these recordings back to himself in his apartment alone in Cherry Creek.

Further, Doctor, assume that some of these phone calls were for the purpose of arranging a Christmas get together with his wife, which occurred on Christmas Eve at the residence of the

defendant's mother in Wayne, New York, and approximately two or two and one-half hours

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hours were spent together between Roberta and Gordon Patterson and that time apparently without incident or argument.

He brought gifts for Roberta and the child Todd, which child was not the child of the defendant.

Following this Christmas Eve together there was one additional contact which occurred on the morning of December 25th, apparently in front of the Northrup residence which was without incident and on the evening of December 26th and the early morning hours of December 27th, that Gordon Patterson was in the residence of Grandma Rooks in a trailer which he had visited on many occasions together with his wife and alone and that a series of phone calls again took place at which time the defendant was attempting to locate his wife Roberta Patterson and which attempts were heard and seen by the grandmother Rooks and that she has testified as to these attempts, including within her testimony the following questions and answers:

[1009]

"Q. Then what happened? A. He kept calling and calling, and I got up and went out and he sat right under the telephone in the chair, and he was crying and crying and the sweat was running right off of him, and every time he would call he would only say, 'I want to know where my wife is.'

"Q. He was crying at this time? A. Yes.

and finally:

"Q. Do you know whether he finally reached Roberta? A. Yes.

"Q. What happened? A. Finally she told him not to call her back again, apparently, because he hung up and

then he called right back. I went into the bedroom to the phone and I said, 'Bobbi, you have got to talk to Skip,' but she hung up on me.

"Q. She hung up on you? A. Yes.

"Q. Did he try to reach her again? A. No, he went right to bed. He knew she was home.

"Q. What time was this? A. I thought it was about 3:00 o'clock.

"Q. Did he stop crying? A. Well, he went in, went to bed, and when he went to bed, he always took his Bible, I could hear him in there. He read it out

[1010]

loud.

"Q. Reading the Bible? A. Yes;"

Further, Doctor, assume that following those incidents, on the early morning hours of the 27th of December, 1970, that the next morning he attended the church, I believe, the Methodist church with Grandma Rooks and Grandpa Rooks;

That at that time and place he did hear a sermon given by Mr. Thomas Coffan, Pastor of the United Methodist Church, in Great Valley, New York, and that a portion of that sermon given on that morning by Mr. Coffan was as follows:

"After awhile when you try and put actions on to change the inside, the real emotions have to come out. You can only pent up your true feelings just so long, then you have to burst, something has to break."

In addition to that statement, the sermon also contained this statement:

"Secondly, it would be hard for him, because it would be thought he was going to marry an adulterous woman who had an affair with another man, perhaps, or that they had already

come together, but this wasn't so, but this is what would appear to the townspeople. So he

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was willing to accept it and it was hard."

Further, Doctor, the statement was made: "That this must have taken great love, a tremendous amount of courage, to watch His son die, when, as the song goes, He could have called ten thousand angels to destroy the world and save Himself, but, yet, He chose not to, didn't stop it. This must have been more difficult to see His son die than to die Himself;"

In addition, Doctor, the statement was made in the presence of the defendant, as part of this sermon, "The real feeling, the real emotion must come out sooner or later. We need a love that doesn't quit when the going is rough;"

Further, Doctor, the statement was made in the sermon, "The world waves at us today all their filth, they wave at us all their incest and debauchery and they are not ashamed of it. They flaunt themselves all over. We see their drunkedness. We see their half-naked bodies. Why should we be quiet? Why shouldn't we tell someone? Why in the name of Jesus should we blush?"

Further, Doctor, assume following his attendance at church and the hearing of that sermon, of which I have quoted portions, that the defendant had dinner with

[1012]

Grandma Rooks and Grandpa Rooks and prepared to leave the residence, but prior to doing so attempted to make arrangements to talk to a Dr. Holland, head of the Psychiatric Department, I understand, at Meyers Hospital in Buffalo, that through a mutual acquaintance, a relative, arrangements might have been made for the next Saturday, and that upon his leaving the residence he told Grandma Rooks that he would see her on Wednesday of the next week;

That he did leave the Rooks residence, did travel to Arkport, New York, where he obtained the automobile of Murray Collins, and a rifle; that he did in the course of events ride to the Cold Springs Road —

THE COURT: I think maybe it would be wise, Mr. Knapp, if we had a short recess. Do you want to break your question?

MR. KNAPP: I can pick it up, yes.

THE COURT: We will have a short recess.

Before we do, Members of the Jury and Alternates, I would advise you not to converse amongst yourselves on any subject connected with this trial, or to form or to express any opinion thereon until this case is finally submitted to you.

[1013]

We will be recessed.

(Whereupon, at 2:36 P.M. a recess was taken.)

[1014]

PROCEEDINGS: 2:55 o'clock P.M.

(Jury and Alternates polled.)

(Defendant polled and present.)

* * * * * * *

WILLIAM LIBERTSON, called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

THE COURT: Any members of the Jury or the Court Officers or attorneys who want to remove their coats they are welcome to.

DIRECT EXAMINATION (Continued)

(BY MR. KNAPP)

Q. Further assume, Doctor, that he did in the course of events ride to the Cold Springs Road and I quote page nine hundred and sixty-one of the transcript.

He did drive past the house, saw John Northrup's car in the driveway, proceeded down the road, but not very far, turned the car around, then parked the car, got out of the car and was upset. There was a gun in the car, took the gun out of the car, walked towards the house. He loaded the weapon, he chambered the round, got to the Rooks residence, went up to the back

[1015]

door, started in the back door, looked in and his wife was in the living room. He walked around to the side window, around to the back of the house. He looked in the window, saw John Northrup seated in the chair, saw his son Todd in a walker, saw his wife standing by the couch in a blouse and slip. He was upset.

The next thing that he could recall he was coming through the door, the gun went off, next thing he could recall was his wife saying to him, "Skip, you do love me, don't you. You proved to me how much you love me."

He said to her, "Bobbi, I think I have just killed a man," and she said to him, "Skip, you really do love me, don't you.'

The next thing he recalled he heard the baby cry. His wife was on the floor. He was on the floor. He was choking her. She was gasping for breath. She was almost unconscious.

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and he was saying to her over and over again, "Repent, Bobbi, I love you;"

That after this he came to his senses, came in control of himself, his wife put her arms around his neck, he lifted her up, asked her if she was all right; she said, "Yes, darling, I am." She said, "Skip, let's get out of here," she says, "I don't want to stay here," and he said, "All right," and they both went out the door;

That in the course of the trip from Cold Springs Road to Arkport, New York the defendant, Skip Patterson, prayed and Roberta Patterson prayed;

Now, Doctor, assuming all of these facts, based upon these facts, the history obtained by you, do you have an opinion, Doctor, with a reasonable degree of medical certainty as to the physical, mental and emotional condition of the defendant when he entered the residence on the Cold Springs Road on the evening of December 27, 1970?

A. I have an opinion, Counselor.

Q. What is your opinion, Doctor?

MR. FINNERTY: May I state an objection for the record, on the ground the question assumes

[1017]

controverted facts and facts not in evidence.

THE COURT: Objection overruled.

BY MR. KNAPP:

Q. You may answer, Doctor.

A. My opinion is that the defendant was under such a state of extreme emotional disturbance that his perceptions were warped, his acts were irrational and his ability to control himself was defective.

Q. Now, Doctor, do you have an opinion based on the same set of facts that I just asked you to assume whether the defendant when he entered the residence on the Cold Springs Road on the evening of December 27th, 1970 was acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be at that time; do you have an opinion, Doctor?

A. Yes, sir.

Q. What is your opinion, sir?

A. My opinion is that this is exactly what happened as you just described it.

[1018]

Q. And the reasons for your opinion, Doctor, are what?

A. The history, the examination of all of the data that I have heard in evidence.

Q. Would you care to amplify, Doctor, in regards to your opinion as to the emotional state of the defendant at that time?

A. His emotional state was one of such disturbance and his disturbance had reached such a peak that the irrational act is associated with that emotional disturbance, and the lack of control is associated with that emotional disturbance. This can be called hysteria, this can be called a dissociative state, but the simple language of great emotional disturbance it seems to me is ample.

MR. KNAPP: Thank you very much, Doctor.

[1019]
CROSS-EXAMINATION

(BY MR. FINNERTY)

Q. Doctor, did you render a written report to Mr. Knapp covering your findings and opinion in this case?

A. Yes, my initial report was submitted to him.

Q. Do you have a copy of that report with you?

A. Yes, sir.

Q. And, Doctor, I notice further that you are referring to one of the three files you have with you there during your testimony. I wonder if I might see both the report and the file you referred to.

A. Yes, sir, you may see everything.

This is material, Counsellor, that I think you are probably familiar with, testimony of Roberta Patterson before the Grand Jury, testimony of Roberta Patterson, preliminary hearing, Mr. Knapp's conference with a Murray Collins.

This is merely the legal material that you are so familiar with.

These are my notes with legal excerpts, an article I cut out of a journal which has some pertinence to this and here is my report.

Q. And, Doctor, the folder you are holding, the folder you [1020]
referred to?

A. This is my personal file, material with the Veteran's Administration in there, the material which was objected to and my personal notes.

Q. I wonder if I might see that?

A. Yes.

MR. FINNERTY: If it please the Court I realize that we were just in recess for a short period, but I would like to ask for another recess to have a chance to look through this material.

THE COURT: I will grant you a recess and again, Members of the Jury and Alternates, I would admonish you that you must not converse among yourselves on any subject connected with this trial or to form or to express any opinion thereon until this case is finally submitted to you.

(Whereupon, at 3:07 o'clock P.M., a short recess was taken.)

[1021]

(Whereupon, Court reconvened at 3:31 P.M.)

(Whereupon, the Jury was polled and 12 members were present, with two alternate jurors present.)

THE CLERK: The defendant Gordon G. Patterson, Jr.?

THE DEFENDANT: Here.

THE CLERK: District Attorney John M. Finnerty?

MR. FINNERTY: Here.

THE CLERK: Defense counsel, Charles P. Knapp?

MR. KNAPP: Here.

WILLIAM LIBERTSON, resumed as a witness on behalf of the defendant, having been previously duly sworn, testified further as follows:

CROSS EXAMINATION BY MR. FINNERTY: (Continued)

Q. Thank you, Doctor.

(Whereupon, document handed to witness.)

A. You are welcome, Counselor.

Q. Doctor, I believe you stated you had testified many times before, I believe you said hundreds, is that correct?

A. Yes, sir.

[1022]

Q. And to keep the record straight, you have testified both on the side of the prosecution and on the side of the defense in criminal cases, isn't that right?

A. Occasionally for the prosecution; more frequently for the defense.

Q. You have testified in your role as a psychiatrist?

A. Right.

Q. Is this, though, Doctor, the first time you have testified where insanity is not the issue, but extreme emotional disturbance is present only?

A. No, no.

Q. You have been in trials where this was the only question before?

A. Yes, yes.

Q. On how many occasions did you see the defendant, Doctor?

A. Once in my office and here today.

Q. That was in the month of March?

A. Yes.

Q. How long did you see him on that occasion?

A. About three hours.

Q. This was when the other gentlemen were present?

A. Right.

Q. When did you first reach your opinion that the defendant

[1023]

was suffering from an emotional disturbance on December 27th?

A. By the end of my first examination.

[1024]

Q. You had not reached that conclusion before the examination started?

A. Oh, no, how could I?

Q. Had you read the record, Doctor?

A. I couldn't without seeing him reach a conclusion. I had read some of the materials, but no conclusions were made until I saw him and examined him.

Q. You did not have in your mind an idea that this was a possible diagnosis after hearing the facts and reading the testimony of his wife?

A. In medicine one does this, Counsellor; it runs through one's mind as a Doctor the various things that a condition might be and to that extent I did what you are implying.

Q. Were you aware at the time you examined him that he had made a statement to a State Police Officer?

A. Yes, I believe I was.

Q. Had you read that statement?

A. I can't remember now whether I did or not.

Q. The facts that you got relative to the case came from Mr. Knapp or his office?

A. Yes, everything that I have told you about.

Q. Now, were you aware, Doctor, in reaching your opinion that the defendant had made a statement that he became
[1025]
mad when he saw the deceased's car?

A. Yes, I took that into consideration since anger is a large part of this emotional upheaval.

Q. Were you aware when you reached your opinion that the defendant had forced his wife to remove the car keys from the body of the deceased after they had come back into the house?

A. I don't know about force, but I was aware of the fact that she did that.

Q. Was it your understanding that she volunteered to do this?

A. I don't know either way. Perhaps, I don't have all the facts. It was my opinion that he asked her to go in and get the car keys and she went in and did so.

Q. I assume, Doctor, that even if she had been forced that would not change your opinion?

A. I don't know what my opinion would be if the facts were that he forced her physically to go in at that point.

Q. Well, he could force her other than by physical violence, could he not, Doctor?

A. He could, yes.

Q. And when you reached your opinion were you aware that at one point he had informed his wife he was not going to turn himself in?

[1026]

A. I was not aware of that.

Q. Would that change your opinion?

A. No, I don't think it would. I would take it into consideration as a factor of self preservation and a need to want to escape. That is what I would have presumed if that was so.

Q. As a matter of fact, Doctor, did your examination and analysis of this defendant reveal a lifelong habit of trying to escape punishment?

A. No, it did not.

Q. He did not apologize immediately after doing violent things during his life?

A. Oh, I see what you mean. There were many apologies, but to escape punishment for his deeds, I wouldn't consider that a part of his personalty. Apology being a form of guilt, Counsellor.

Q. Were you aware when you reached your opinion that the defendant had stated he realized John Northrup was dead on the way to Arkport?

A. Yes, I was aware of that.
[1027]

Q. And were you aware when you reached your opinion that the defendant appeared normal and calm to Mrs. Rooks in her house before he left that house on the 27th?

A. I believe so.

Q. And were you aware that when you reached your opinion that the defendant appeared normal and calm to a close friend, Murray Collins, when he visited him on the 27th?

A. Yes, sir, I was aware of that.

Q. Were you aware that the defendant and Mr. Collins had considerable talks relative to the generator in his car and went to a garage in Hornell for the purpose of fixing it?

A. Yes, I think I was aware of that.

Q. Were you aware that Mr. Collins, after being with the defendant for some time, entered into the St. James Hospital in Hornell with the defendant for the purpose of visiting Mr. Collins' daughter?

A. I don't believe I was aware of that.

Q. And you were also, I assume, aware that Mr. Collins freely allowed him to take the car, the Collins car?

A. Yes.

Q. And freely handed to him in the house when Mrs. Collins was present a .22 caliber rifle?

[1028]

A. Yes, sir.

Q. Were you aware, Doctor, that he appeared normal and calm in the Morrell house in the presence of Mr. Morrell and his wife and children?

A. No, but I am willing to accept that that is so.

Q. And, further, that Mr. Morrell was willing to lend him a shotgun at about 7:00 o'clock on the evening of the 27th?

A. I am not aware of that.

Q. Were you further aware, Doctor, that at the time you formed your opinion that the defendant had parked the Collins car some two-tenths of a mile away from the Rooks residence before going to it?

A. Yes, I believe so.

Q. Were you aware that he had made no statement nor said no words before firing the shots?

A. Yes, that is my concept of it.

Q. Were you aware that he appeared very calm and collected to his wife on the trip from the Cold Springs Road to Arkport?

A. This is after the —

Q. After the shooting.

A. The homicide?

I can't recall, so I must say I am not aware.

[1029]

Q. And I assume that your opinion would be the same even if you had been aware of these facts?

A. Well, they were praying on that trip, and my concept of that, in association with everything, would indicate that there was a tremendous amount of pressure rather than calmness. So if his wife said that he was calm, I would question her observations, but not being there I can't argue too much with it.

Q. You would question what she saw, not your opinion, is that right?

A. I said "not being there, I can't argue too much with it."

Q. That would be what you would question, what she saw?

A. Yes, I think so.

Q. Doctor, would you describe immaturity as a factor in your diagnosis here?

A. That is an abstraction that I and most people from Cicero's time on have a great deal of difficulty in defining, and its counterpart, maturity, is equally difficult. The only way I can understand immaturity is to think of the behavior of a five-year-

old kid or a ten-year-old kid and to say that if an adult behaves in that way, then his behavior is immature, but you even run into trouble with that, Counselor, because some little
[1030]
kids behave extremely maturely.

Q. I am sorry, I did not hear the last.

A. Some little kids behave extremely maturely, so it is not easy for me to answer that.

Q. Would the reverse be true, Doctor, that some adults behave extremely immaturely?

A. Yes, yes, no question.
[1031]

Q. Doctor, the article in your file here, does that mention immaturity and basic personality problems, frustrating circumstances, as a problem here, is that article relative to a Vietnam veteran?

MR. KNAPP: If he is going to refer to an article — I don't know what it is — I think it should be marked.

MR. FINNERTY: I will withdraw it and try to go at it this way.

MR. KNAPP: Have it marked.

MR. FINNERTY: The question is withdrawn.

THE COURT: It is withdrawn.

(BY MR. FINNERTY)

Q. Is this part of your file?

A. The article was part of my file, yes.

Q. Doctor, I believe you testified that the statement was made to you, "One man is dead because of her and she needs help worse than I do."

A. This is the defendant's concept.

Q. That statement was made to you today, wasn't it, Doctor?

A. Yes.

Q. Doctor, in reaching your conclusion of an extreme emotional disturbance or could we also say heat of passion?
[1032]

A. The old term heat of passion was a good one. I liked it. It is applicable.

Q. As part of reaching that, would any arguments which the defendant had with the deceased play any part?

A. Yes.

With your permission, my interpretation of heat of passion is that it includes within it not only jealousy, anger, fear, anxiety, panic and all the emotions that cause a person to react in a passionate way, an excited way.

Q. That is what you found here?

A. So therefore arguments would be a part of that, yes.

Q. Now, I believe you stated that the sermon played a part in your diagnosis here?

A. The sermon played? Yes, it did.

Q. Would your opinion be the same if the defendant had not heard the sermon?

A. Well, if you remove one part, then the remaining parts may be what I am forced to rely on. This is the way medicine is. In this case my conclusions would be the same.

Q. Doctor, your examination of the defendant, you were aware of his Marine training and service?

A. Yes.

[1033]

A. Yes.

Q. Is it part of your opinion that the defendant having been trained to kill by the Marine Corps was more susceptible to this extreme emotional disturbance?

A. I think that is a very common factor. Perhaps forty to fifty per cent of the veterans of this particular war, and I believe it is a part in this particular veteran, yes.

Q. And the fact that he had a wife who he believed to be an adulterous woman and then heard the sermon, that was a part of it?

A. Yes, sir.

Q. Doctor, is it your opinion that the period which he was confined to the Steuben County Jail prior to your examination, would that have any effect upon your opinion?

A. No, I don't think so. I assume this is a decent jail.

Q. That he would sustain no personality change as a result of this being incarcerated?

A. I think not. On the basis of my knowledge of the County jails in most of New York State.

MR. FINNERTY: Thank you, Doctor. No further questions.

RE-DIRECT EXAMINATION

[1034]

(BY MR. KNAPP)

Q. Doctor, what is the title of the article which you have that Mr. Finnerty mentioned?

A. "The Making of a Murderer." An article written for a psychiatric journal by a military psychiatrist.

Q. This pertains to military service, the article?

A. Yes.

MR. KNAPP: Thank you, Doctor.

RE-CROSS EXAMINATION

(BY MR. FINNERTY)

Q. What was the last word in that title?

A. "The Making of a Murderer."

THE COURT: Do you gentlemen have any further questions?

MR. FINNERTY: No further questions.

MR. KNAPP: No questions.

THE COURT: You may step down. Thank you, Doctor.

(Witness excused.)

COLLOQUY

STATE OF NEW YORK
COUNTY COURT — STEUBEN COUNTY

(TITLE OMITTED IN PRINTING)

* * *

[1062]

(Whereupon, the following proceedings were had in Chambers at 10:45 o'clock A.M., out of the presence of the jury.)

THE COURT: We are in session in Chambers and for the record it should be noted that the defendant is in Chambers with his Counsel, Mr. Knapp, and the District Attorney and the Clerk of the Court are present.

Mr. Knapp?

MR. KNAPP: At this time I propose to close the defendant's proof in regards to the defendant's defense.

I appreciate the fact that we have no indication at this time as to whether Mr. Finnerty or the People will produce the doctor. I believe his name is Lubin, the doctor who did examine and it is part of the record that he did examine the defendant at the Steuben County jail.

I appreciate this request may be somewhat unusual and, as I say, we have no indication as to whether the People will produce the doctor, but I would request at

[1063]

this point — withdraw that.

I think the defendant is entitled to know at this point whether Dr. Lubin will be a witness in this case or not.

THE COURT: I don't agree with you, Mr. Knapp. You may close your case and the Court can always allow you to reopen for the purpose of rebuttal of any type you see fit.

Colloquy

MR. KNAPP: This is fine, your Honor. I appreciate your Honor saying that. With that understanding I will close my proof.

I can foresee the possibility of no witnesses being produced by the People and I would be limited at that point because I had closed my proof and I don't want to limit myself at this point, your Honor, and I am sure you understand my position.

THE COURT: You want to close with the privilege of re-opening.

MR. KNAPP: Yes, sir.

THE COURT: Mr. Finnerty, do you have anything to say in respect of this rather unusual closing suggestion of counsel?

[1064]

MR. FINNERTY: Not now. I can see what is behind the proposal here. I would like a little time to tell the Court and Mr. Knapp after lunch just what I intend to do.

THE COURT: That sounds reasonable.

(Discussion off the record.)

THE COURT: I think we had better go on the record.

I assume the Court has the right to allow you to close with the right to maybe reopen your part of the case to call additional witnesses.

MR. KNAPP: That is exactly what I am asking for.

THE COURT: Which would in this case be an additional defense witness?

MR. KNAPP: Yes, sir.

I will tell you frankly it would be Dr. Lubin.

THE COURT: I believe we suspected that is what you had in view.

I think we will recess then back into the Court Room and bring the jury back in and you can close your case.
[1065]
MR. KNAPP: Yes, sir.

(Whereupon, at 10:50 o'clock A.M., a recess was taken.)
[1066]
(Whereupon, Court reconvened at 11:38 o'clock A.M.)
[1067]
MR. KNAPP: If it please the Court, I think your Honor indicated that at this point we should put on the record that the defense rests.

THE COURT: Excuse me, that is right, Mr. Knapp, Yes.

(Whereupon, at 11:42 A.M. the Jury retired from the courtroom.

* * *

[1069]
MR. KNAPP: Yes.

(Whereupon, at 11:44 A.M. a recess was taken until 2:00 o'clock, same date, in the Surrogate's Courtroom, in Bath, New York.)
[1072]
PROCEEDINGS: June 4, 1971, at 2:00 o'clock P.M.

(Defendant polled and present.)

THE COURT: Which one of you Gentlemen want to start this procedure? Mr. Knapp?

MR. KNAPP: Well, your Honor, as you are aware of the remarks made in Chambers in Corning this morning, I appreciate the situation that we are in at the present time procedural-wise, that is, that the defendant has rested his case.

The legal question before your Honor is assuming that the People do not call a so-called expert medical witness to contradict the evidence in the record on behalf of the defendant in relation to the affirmative defense of extreme emotional disturbance, it is the position of the defendant that assuming, as I say, no such expert is called that your Honor in his main charge, when the appropriate time comes, must instruct the jury that the strongest inference — I am quoting now from a couple of cases we had out this
[1073]
morning — the strongest inference has to be drawn by the jury that the testimony of the missing witness would be in favor of the defendant, supporting our doctor's testimony and against the People's case and this is the situation we are in.

As I say, I appreciate the fact that Mr. Finnerty has not, nor did he have to disclose whether the doctor would be testifying Monday. However, I think in fairness, the real question being whether I should subpoena him or not between now and Monday is your Honor's indication as to its charge on this point.

Thank you.

MR. FINNERTY: If it please the Court, we are, to keep this in perspective, talking about the affirmative defense mentioned in the Penal Law relative to extreme emotional disturbances is what we are talking about in which the burden to establish such defense is on the defendant and once it is established by a preponderance of the evi-
[1074]
dence the burden of his proving such defense by way of rebuttal testimony is upon the People.

Of course, the People may introduce rebuttal testimony on any part of the defendant's case.

Now, I can state to the Court at this time, which I was not prepared to do this morning, that it is not now my intention to call Dr. Lubin to the stand.

Relative to the Court's charge, the latest case which I found dealing with the language of the inference to be charged was People against Moore, a Third Department case in 17 A. D. 2nd. Moore, of course, cited in a later case in 32 A. D. 2nd, but immediately after the strongest possible inference is a statement by the Third Department that this language need not be accepted entirely by the Court; that the Court can pick its own language if it so chooses.

I am not going to suggest what the

[1075]

language of that charge ought to be. What I am suggesting is that the Court should pick its own language having in mind the People's obligations or rights in rebuttal. They don't have to rebut anything, can attempt to rebut everything and that that is all it is is a rebuttal from one opinion of another if the expert were called or if the inference is taken and certainly I would concede that if Dr. Lubin were called his testimony would be supporting and his finding would be supporting the opinion of Dr. Libertson, which was heard in Court yesterday relative to extreme emotional disturbance and I concede that I don't know where Dr. Lubin is, frankly, whether he is in the country or out of the country or any place. My last communication with him involved a letter containing his voucher some five weeks ago. I have not spoken with the gentleman since then. I think my concession as to what his testimony

[1076]

would cover puts the thing in its perspective.

The only thing I don't like to be handed is about the strongest possible inference. This is not in our direct case, which the inference is to be drawn. It is to be drawn in the event we choose to put in rebuttal on the expert's testimony.

MR. KNAPP: I appreciate what Mr. Finnerty said and he is quite fair about it. The defendant does not intend to attempt in any way to ask your Honor at this time as to what wording should be in the charge. Our only request that this particular subject is so important that your Honor give it his due consideration and that some point in the charge it must be covered. That is our position.

THE COURT: Of course, I do recognize the fact that it is an affirmative defense and under ordinary circumstances, assuming that an expert had not examined the defen-

[1077]

dant, the prosecution wouldn't have had to have hired a psychiatrist to do that, wouldn't have had to combat it, in other words. However, I would say this: that I will take the inference in the charge in my own words and if either of you Gentlemen, of course, don't agree with it you may both except to the charge.

* * *

[1078]

(Whereupon, at 2:10 o'clock P. M., a recess was taken until 10:00 o'clock A. M., Monday, June 7, 1971.)

* * *

TESTIMONY

Gordon Patterson, Recalled, Direct

STATE OF NEW YORK
COUNTY COURT — STEUBEN COUNTY

(TITLE OMITTED IN PRINTING)

* * *

[1080]

(Whereupon, Court reconvened at 10:15 o'clock A.M.)

GORDON G. PATTERSON, JR., the defendant, resumed as a witness on his own behalf, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KNAPP:

Q. Mr. Patterson, were you examined on April 30, 1971
[1081]
by Dr. Gordon Lubin of New York City?

A. I was.

Q. Did this examination take place at the Steuben County Jail?

A. Yes, it did.

Q. Were Mr. Finnerty and myself within the confines of the jail at that time?

A. You both were.

Q. Did this examination consist of a series of questions and answers that you gave to the doctor?

A. Yes, it did.

Testimony of Gordon Patterson, Recalled Direct

Q. Do you recall about how long it took?

A. Approximately, an hour and a half to two hours.

MR. KNAPP: Will you mark this for identification, please?

(Whereupon, certified copy of Order was marked Defendant's Exhibit N for identification.)

MR. KNAPP: To identify the Order, your Honor, for the record, it is an Order signed by yourself on the 29th day of April, 1971, permitting, the examination of the defendant on the 30th day of April, 1971, at 10:00 A.M. at the Steuben County Jail.

[1082]

I would offer the order in evidence.

MR. FINNERTY: I have no objection.

THE COURT: It is received.

(Whereupon, Defendant's Exhibit N for identification was received in evidence and so marked.)

* * *

CHARGE OF THE COURT

STATE OF NEW YORK
COUNTY COURT — STEUBEN COUNTY

(Title Omitted In Printing)

* * *

[1138]

Members of the Jury and Alternates:

The People of the State of New York have called upon you to render a most important service. Although you knew that such service would involve great responsibility, would be long, tiresome, and exacting, you responded to that call. For such service, I desire to extend to each of you my profound thanks.

A citizen can perform no greater duty in time of peace than jury duty. No other public service requires a greater degree of intelligence, fairness, patience, integrity and courage. A juror assumes great responsibility when he sits in judgement upon another and determines the issues that arise in a trial between the People of the state and a defendant.

Both the People and the defendant are entitled to a fair and impartial trial. Both must receive equal consideration under
[1139]
the law.

This court consists of two parts: The Jury and the Judge. You, the Jury, are the sole and exclusive judges of the facts of credibility of the witnesses, of the weight and sufficiency of the evidence and of the guilt or innocence of the defendant. The number of witnesses should not concern you. The quality of their testimony should. In appraising and evaluating the testimony of any witness and in assessing his credibility, you should take into consideration among other things, the manner of his testimony, his background, any reward he has received or

hopes to receive for his testimony, his motives, if you find any; his interest in the outcome of the case; any crimes he has committed and any acts of moral turpitude which he either admitted or which have been proven against him. None of these matters disqualify a witness, but they should be considered by you in determining whether
[1140]
or not they affected his credibility. If so, to what extent.

It is your obligation to consider the evidence adduced on direct and cross examination.

If you find from the evidence that any witness has knowingly and wilfully testified falsely to a material fact in this case you have a right to disregard his entire testimony, or you may accept that part of his testimony you believe, and reject that part which you disbelieve.

My function is to preside at the trial, to conduct it fairly, impartially and in an orderly manner, to charge you upon the law, to rule upon objections, motions and the admissibility of evidence. You must accept the law from me. You are bound by my rulings. As you are supreme in the determination of the facts, in the appraisal of the credibility of the witnesses, and in the determination of the weight and sufficiency of the evidence,
[1141]
the Court is supreme in the determination of the law. We must not invade each other's province.

When I made rulings upon questions of law, upon motions, upon objections, or upon the admissibility of evidence I made them in accordance with my knowledge of the law. I did not make them arbitrarily. I did not intend by any ruling I made or by any questions I asked to convey to you that I entertain any opinion as to the guilt or innocence of the defendant. The law forbids a judge to express or to indicate any opinion he may have concerning the guilt or innocence of a defendant.

Members of the Jury, I shall here again read the indictment for your information:

"The Grand Jury of the County of Steuben, by this indictment accuse the defendant of the crime of Murder, committed as follows:

"The defendant on the 27th day of
[1142]
December, 1970, in the Town of Urbana, County of Steuben and State of New York, did knowingly and unlawfully and with the intent to cause the death of another person, did cause the death of another person, to wit: the defendant on the aforesaid date at the Robert Rook residence in the Town of Urbana, New York, did intentionally cause the death of John Northrup by intentionally firing at John Northrup a loaded firearm thereby inflicting wounds which caused the death of said John Northrup."

An indictment is a written accusation by a Grand Jury charging the defendant with the commission of a crime. It is without probative force and carries with it no implication or suspicion of built. The defendant pleaded "not guilty." Under our law every defendant indicted for a crime is presumed to be innocent. That presumption of innocence belongs to and remains with him throughout the trial and is his
[1143]
until such time as the jury unanimously agrees that by reliable and credible evidence his guilt has been established to its satisfaction beyond a reasonable doubt.

If and when that time comes, the presumption of innocence ceases and is no longer his.

The burden of proving the guilt of a defendant beyond a reasonable doubt rests at all times upon the prosecution. A defendant is never obliged to prove his innocence.

Before you can find a defendant guilty, you must be convinced that each and every element of the crime charged and his guilt has been established to your satisfaction by reliable and credible evidence beyond a reasonable doubt. Evidence which is evenly balanced is naturally not beyond a reasonable doubt. If the evidence is as consistent with innocence as it is with guilt, the defendant is entitled to the innocent construction and he must be
[1144]
acquitted. Evidence consists of oral testimony and exhibits admitted in evidence.

The measure of proof required by our law is "beyond a reasonable doubt," which is defined as follows:

A reasonable doubt is an actual doubt that the jury is conscious of having after going over in their minds the entire evidence of the case, giving consideration to all the testimony and to each and every part of it. If then you feel uncertain and not fully convinced by the evidence, or lack of evidence, that the defendant is guilty of the crime charged, and if you believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt; and it you entertain it, the law commands you to give it to the defendant and he must be acquitted.

In coming to the conclusion, use the
[1145]
the same logic, experience and common sense that you use in deciding any important matter that you may meet in your daily business life. Examine all of the evidence consider the credibility of all the witnesses, appraise and evaluate their testimony, do so without prejudice and without sympathy and then ask yourselves: "Is there a doubt which arises from the evidence or lack of evidence in the case? Is it reasonable, under the cir-

cumstances to have such a doubt?" If that is your honest opinion, the law commands you to give the benefit of that reasonable doubt to the defendant.

But a reasonable doubt is not a mere whim, guess or surmise nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable duty. It is a doubt that must be founded on the evidence or lack of evidence. It is a doubt that must be founded in reason and must survive the test of reasoning.
[1146]

The law says that you must, therefore, before you come to a conclusion of the guilt of the defendant, be convinced that his guilt has been established to your satisfaction beyond a reasonable doubt, not beyond all doubt, because in many cases that would be an impossibility.

I shall briefly review the evidence in this case. If my review omits any evidence which you recall, then by all means rely upon your own recollection, not mine. Under our laws the jurors' recollection of the evidence prevails. You are under no obligation to accept any other version of the evidence except your own. You must decide the case upon the evidence which you accept and believe, and the inferences you draw from it. Should there be any doubt about your recollection of the testimony of any witness, or the contents of any exhibit let me know and I'll have it read to you by the reporter and you may examine the exhibits.
[1147]

If I refer, or fail to refer to certain testimony, it does not mean that you should believe or give greater weight to the testimony I refer to or that I may omit. Remember, you are the sole and exclusive judges of the facts, the weight and sufficiency of the evidence and the credibility of the witnesses.

Now in support of the charges in the indictment — the District Attorney brought before you certain witnesses and has offered in evidence a number of exhibits — you will recall that the People's first witness was:

Dr. John Bentley who testified that he was on call at the Ira Davenport Hospital in Bath on the 27th of December, 1970, when John Northrup was admitted to the Emergency Room. He described Northrup's wounds and physical condition before being sent on to Arnot-Ogden Hospital in Elmira.

You will recall the testimony of Paul Westervelt, a member of the Bath Volunteer
[1148]
Ambulance Corps, who testified that they were summoned to the Rooks residence on the Cold Springs Road where they picked up John Northrup whom they first took to Ira Davenport Hospital and then transported to Elmira where he was dead on arrival.

You will also recall the testimony of Kent Collins, another member of the Bath Volunteer Ambulance Corps, and of his wife Frances Collins, a registered nurse, who confirmed the testimony of Paul Westervelt concerning the ambulance run to Arnot-Ogden Hospital in Elmira with John Northrup, and who further testified that John Northrup stopped breathing at 9:47 o'clock while enroute to the hospital in Elmira.

There was also testimony by Lida Westervelt, who is another member of the Bath Volunteer Ambulance Corps and who accompanied the ambulance when they picked up John Northrup at the Rooks residence.

You will also recall and consider the testimony of Dr. Edward J. P. Droleski, a

[1149]
Deputy Medical Examiner for Chemung County, who testified that the cause of death of John Northrup was multiple gunshot wounds of the head (two to be exact). Also there was admitted as evidence at this time Dr. Droleski's notes on this case and three X-rays, being People's Exhibits Nos. 1, 2, 3 and 4.

There also was the testimony of Dr. Sandor Benedek, who is a Steuben County Coroner. His personal notes on the case were admitted as People's Exhibit No. 5 and received in evidence. Also, two X-rays taken at his direction at the time of the autopsy were admitted as People's Exhibits Nos. 6 and 7. Also, the Pathologist's Report was admitted as Exhibit No. 8 and a box containing metallic fragments taken from the decedent's head was admitted as Exhibit No. 10.

You will also recall that Dr. Benedek stated that either wound could have been fatal and that the bullets must have been
[1150]
fired from a distance of two feet or more.

Officer Jan Ketchum, a New York State Trooper, testified that on his regular tour of duty on December 27th, 1970 that he was called to the Rooks residence in the Town of Urbana. He and Trooper Hodges arrived just as the ambulance was leaving and Sergeant Carpenter of the New York State Police arrived shortly thereafter but left almost immediately to go to the hospital, leaving the troopers to secure the scene. Trooper Ketchum conducted a preliminary search and discovered two .22 caliber cartridge cases or shell casings and a partial box of .22 caliber long rifle super X's. These were admitted as People's Exhibits Nos. 11 and 12.

The next witness was Trooper Thomas McHugh who is assigned to the Identification Section. A diagram made from the measurements and drawings that he had made and showing the

approximate location of furnishings, and so forth, was admitted as
[1151]
evidence, being People's Exhibit No. 13. Exhibits Nos. 14 through 20 were photographs taken at the scene.

The People's next witness who took the stand was Rickey Lee Rooks who testified as to his activities during the day of December 27, 1970, and who also described coming home that evening and finding John Northrup lying on the floor in the living room of the Rooks residence and of his calling the ambulance and then calling his boss, Mr. Miller, who summoned John's parents. He also told about finding the shell cases. He also told about going to the Troopers' Barracks where he stayed until about 4:00 A.M.

You will recall Robert Horn, a member of the New York State Police, assigned to the Scientific Laboratory, who qualified himself as an expert in ballistics and testified as to the identification of Exhibits No. 10 and No. 11, and who had examined Exhibit No. 21, the .22 rifle,

[1152]
and did testify that the two shell cases, Exhibit No. 11, had been fired from the .22 rifle, Exhibit No. 21.

You will recall the testimony of Frederick Morrell who lives at Bath, New York, who testified he became acquainted with the defendant in 1967 and worked with him for a year and a half and was a friend of the defendant. Mr. Morrell described how defendant was dressed, the Buick auto he was driving and the conversation between himself and the defendant as to the defendant desiring to borrow the witness' shotgun, which was agreeable, and that defendant would pick it up the following morning, and then defendant left the home of the witness about 7:00 P.M.

You will further recall the testimony of Murray Collins of Arkport, New York who is a friend of the defendant. He pointed out and identified the defendant and said he had known him for about two years. He said he knew defendant by the name of
[1153]
"Skip" and that defendant called him "Dad."

Mr. Collins testified that he saw defendant in the afternoon of December 27th between the hours of 3:00 o'clock and about 6:00 o'clock and described the clothing worn by defendant.

He described the activities of himself and defendant between those hours. He further testified how he loaned his '60 Buick to defendant so he could drive to Bath to see a girl. He also testified that defendant wanted to borrow his .22 rifle and that he loaned it to him along with some cartridges.

Mr. Collins further testified that he again saw defendant about 8:45 P.M. that same day, along with defendant's wife, Mrs. Patterson, and baby. The witness then identified Exhibit No. 21 as the rifle loaned to the defendant earlier that day.

Mr. Collins further testified that defendant called to him from the back porch and when he went to him, the defendant said
[1154]
he had killed a man and that he wanted to turn himself in.

Mr. Collins further testified and described going to the Howard Jones home and thence to the phone booth at Arkport and what conversations and proceeding took place there.

You will further recall the testimony of Howard Jones, a Constable of the Town of Hornellsville and a Special Deputy Sheriff, who described the events and conversations which took place at the home of the officer when Murray Collins brought the defendant there, and also the events and conversations which took place at the phone booth in Arkport.

You will recall the testimony of Trooper James Cortese who described what took place at the phone booth in Arkport and his testimony that defendant told him he had shot a man and that it was John Northrup. He further described the conversation he had with defendant on
[1155]
their trip from Arkport to the Trooper's Substation at Bath, and how he had advised defendant of his rights under the law.

You will recall that Roberta Rooks Patterson, the defendant's wife, testified and described how she had gone with decedent, John Northrup, for quite some time and had even been engaged to him, but she broke the engagement and later met the defendant, Mr. Patterson, in the summer of 1969 and went with him steady excepting that she broke their engagement about five times before they were married the latter part of January 1970. She testified that she was about six months pregnant when she married defendant and that neither the defendant nor John Northrup was the father of the child and that she gave birth to the child on March 28, 1970.

She further testified that she and her husband had a number of arguments and that she left the defendant on four occasions during their marriage for as much as a
[1156]
week at a time. And then the last time she left defendant was August 5, 1970 and that she had not lived with him since that date and that soon thereafter she commenced a divorce action against the defendant. Mrs. Patterson described where she and the defendant lived during the time of their marriage, and that on at least two occasions the defendant did choke her by placing panty hose about her neck.

She further described the events and happenings which took place at the Rooks' residence on the evening of December 10,

1970 when defendant came to the Rooks' residence and found Mrs. Patterson and the decedent there alone.

You will recall that Mrs. Patterson testified that the defendant called her many times on the phone and that sometimes she would talk with him and other times she would hang up.

You will further recall that Mrs. Patterson described the various events
[1157]
which took place between December 10, 1970 and December 27, 1970 and that she testified that she talked on the phone with defendant about 2:30 A.M. on December 27, 1970 after she had been in the company of John Northrup and she did tell defendant that she was dating John Northrup.

You will further recall that Mrs. Patterson described the entry of the defendant into the Rooks' residence at about 8:00 o'clock the evening of December 27, 1970, how he was dressed and the events of the shooting of John Northrup by defendant and generally all the events which took place at the Rooks' residence.

You will further recall that she described what took place between herself and the defendant on their trip to Arkport to the home of Murray Collins, and you will also further recall Mrs. Patterson's testifying as to the events which took place at the Collins home and at the Troopers Substation at Bath.
[1158]
And you will further recall that the witness testified and described with whom and where she and her baby have lived since the night of December 27, 1970.

You will also recall the testimony of Trooper William J. Recktenwald who described how he met the defendant, and Mr. Collins and others at the phone booth at Arkport and who identified Prosecution's Exhibit No. 21 as the weapon he took

from the Collins' residence and further testified that when he took the gun it was loaded and that he unloaded it and put the cartridges in his pocket and did identify Prosecution's Exhibit No. 22, a plastic box, which contained the cartridges which he had taken from Exhibit No. 21.

You will also recall the testimony of Investigator Jesse J. Moulthrop of the New York State Police who testified that he was called to Bath to the State Police Substation and arrived there at about 10:15 to 10:30 P.M. Investigator
[1159]
Moulthrop identified Prosecution's Exhibit No. 21, the rifle, and Exhibit No. 22, the plastic box of four cartridges, which he had received from Trooper Recktenwald. You will further recall his description of the interview with the defendant after taking him to the second floor of the substation and that before questioning the defendant, Lieutenant Parmater of the New York State Police gave the defendant the so-called Miranda warning of his rights and that thereafter he typed the statement set forth in Prosecution's Exhibit No. 23, after the defendant having narrated the same to him, and which said statement was then read and signed by the defendant and then read by the District Attorney into the record.

The defendant in support of his position brought before you certain witnesses and has offered in evidence a number of exhibits.

The first witness called by the
[1160]
defense was Virginia Ann DeMuth, the defendant's mother, who told about his background and early childhood and also about his reaction to his own father's death. She described his growing-up years and related his service record and the injuries he sustained while in the service. She also noted certain changes in his behavior when he returned home after being discharged

from the Marine Corps. She further testified as to the marriage of her won and his wife and described the events at her home leading to the break-up of the marriage and of the subsequent efforts of her son toward reconciliation. She described the Christmas Eve celebration at her home in some detail and then made note of the fact that she and her household were out of town for the remainder of the Christmas weekend.

The next witness called by the defense was Robert W. Rooks, father of Roberta Rooks Patterson, who described the
[1170]
situation that existed between his daughter and the defendant during the period from December 10th to 27th, 1970. He testified that John Northrup had stayed overnight with Roberta on two different occasions and he further testified that on December 11th in conversation with the defendant he told him he should "give up on Roberta." He also related the fact that there were many phone calls to his home on the evening of December 26th and early morning of December 27th.

You will recall the testimony of Evelyn Grace Pauline Rooks, mother of Robert Rooks and grandmother of Roberta, who testified that the defendant made "a lot" of phone calls to Roberta from her trailer home on the night of December 26th and the early hours of December 27th, and that they resulted in his being in a very distraught condition but that he went to church with them on the morning of December 27th.
[1171]

You will further recall the testimony of Thomas Coffan, who is the pastor of the United Methodist Church in Great Valley, New York, which the defendant attended on the morning of December 27th, 1970, and who gave the complete context of that same sermon that he delivered that morning in his testimony.

The next witness was Gregory Scott Patterson, the Defendant's younger brother, who told about Roberta's return to the DeMuth residence to get her belongings after she had left and of her breaking into the locked bedroom to get them. He also testified concerning the events of the evening of December 10th when he accompanied his brother to the Rooks residence on the Cold Springs Road.

You will recall the testimony of A.J. Glashauser, who is Chief of Medical Administrative Division at the Veterans Administration in Bath and who brought certain records from the V.A. with him.
[1172]
This witness testified as to a telephone request for a neuropsychiatric examination made by the Defendant on December 15th, 1970.

You will recall the testimony of the defendant, Gordon G. Patterson, Jr., who described his enlistment in January of 1968 and training and training locations in the Marines and his eventually being shipped out to Vietnam in the DaNang area and how he was wounded and recovered and returned to his home through the efforts of Red Cross to visit his sick sister. You will further recall that he again returned to Vietnam in 1969 and was wounded the second time and was discharged from the service in June of 1969.

You will also recall that the defendant described how he met Roberta Rooks Patterson, their engagement, how they broke their engagement several times and were married in January of 1970 and where they lived during and up to August 5, 1970.
[1173]

You will further recall that the defendant described the break-up of their family life on August 5, 1970 and the circumstances and altercations between the defendant and his wife and defendant and his stepfather.

You will also recall that the defendant described the incident which took place between defendant and his wife, and defendant and John Northrup at the Rooks' residence on December 10, 1970.

You will further recall that the defendant testified about the many telephone calls made by defendant to his wife, that sometimes she talked with him and other times she would hang up.

You will recall the events which defendant described which took place Christmastime, when he was with his wife several hours.

You will further recall that defendant testified that he called many times on the phone for Roberta on December 26th
[1174]
including the early morning hours of December 27th and did talk with her a short time. He further testified that he went to church with Roberta's grandfather and grandmother and heard the sermon preached by Mr. Coffan.

You will further recall that the defendant described the events and happenings which took place at the Rooks residence at about 8:00 o'clock the evening of December 27, 1970; that he went to the Rooks residence, saw John Northrup's car there, parked his auto and taking the rifle went to the Rooks house, looked in through a door and window, saw John Northrup, the baby and his wife Roberta. He described how Roberta was dressed, in a blouse and slip, and then the next thing he knew he came through the door and the gun went off, and a few moments later he told his wife, "Bobbi, I think I just killed a man."

You will recall next that the defendant
[1175]
described how he had choked his wife until she was nearly unconscious.

And you will further recall that defendant described their trip of defendant, Roberta and the baby from Bath to the Collins Place at Arkport.

You will recall also that there was certain testimony given by the defendant, Virginia Ann DeMuth and Attorney Charles Knapp regarding tapes recorded by the defendant of certain phone calls which he, the defendant, had made and which the Court declined to be received in evidence.

You will further recall Dr. William Libertson, a witness called by the defense, who qualified himself as a consulting and teaching psychiatrist and who, when presented a hypothetical question that reviewed an entire situation similar to the one that has been presented here in court concerning the defendant, rendered his opinion based upon such question that the defendant was under such a state of
[1176]
extreme emotional disturbance that his perceptions were warped, his acts irrational and his ability to control himself defective.

You will recall testimony by John Langendorfer, who was a former employer of Gordon Patterson, Jr., who testified as to the good character of defendant and whom he identified as "one of the best boys who ever worked for me."

The next witness was Walter C. Flynn for whom the defendant worked and who testified as to the good character of defendant and that the defendant was an exceptional employee whom they consider on a leave of absence at the present time.

You will recall also further testimony by Murray Collins regarding the conversations that took place on the night of December 27th, 1970 with the defendant and Howard Jones and himself and that Howard Jones never told the defendant about the so-called Miranda rights. He testified

[1177]
further about the conversation he had with the defendant's wife at the time of the preliminary hearing.

You will recall that the defense this morning called the defendant back to the witness stand and that he testified that he was examined by Dr. Martin Lubin, a psychiatrist for the People, in the presence of Mr. Knapp and Mr. Finnerty, pursuant to an Order of this Court which Order was Exhibit N for the defendant.

Members of the Jury, the Court would here inform you that the People, quite some time before this trial began, were allowed pursuant to law and by agreement of counsel, to have the defendant examined by a psychiatrist, but failed to call him to be a witness.

I charge you that you may take into consideration and may strongly infer from the fact that the People failed to call their psychiatric expert that his testimony would have been favorable to the claim of
[1178]
the defendant as to his contention of extreme emotional disturbance.

However, this still does not eliminate the fact that the defendant must prove his contention by a preponderance of the evidence, which I will hereafter explain to you.

The People have offered in evidence conversations, statements or declarations claimed to have been made by the defendant to the police. The Prosecution has submitted these in the belief that they should affect your verdict. But these conversations, statements or declarations may not be considered by you unless you first determine and conclude that the defendant, then being in police custody, made them knowingly, intelligently and voluntarily.

By police custody, I do not mean that you are to consider only formal custody after arrest and booking. In the sense I am now using those words, I mean at any
[1179]
time when he was actually in the physical control of the police, and this you are to determine by the surrounding circumstances.

When he is in such control, a person must be given certain warnings in clear and understandable terms, which leave no possibility of doubt in his mind, of the rights which are his and these are:

1. He has the absolute right to remain silent.

2. Whatever he says can and will be used against him in court, and this must be made clear to him at the time.

3. He has the right to talk to a lawyer — any lawyer of his own choice — and to have his lawyer with him while he is being questioned.

4. If he cannot afford to retain his own lawyer, on his request a lawyer will be appointed to represent him, for whose services he need not pay.

If you determine that this defendant was not made to understand these rights,
[1180]
and each and every one of them, you must completely disregard any words uttered by him after he came into physical custody and control of the police, and any such conversations, statements or declarations cannot be considered in evidence against him.

If you determine these warnings were clearly and understandably given, and understood by the defendant, even if not in the precise words I have used, you must then determine whether the defendant's making of the statements placed in evidence was

done by him knowingly, intelligently and voluntarily with the intention of waiving these rights or any of them. In so determining, you must consider all of the surrounding circumstances, his intelligence, his age, his experience, the situation in which he found himself, his emotional state at the time and how it affected him. If you find that all of these circumstances were such as to prevent a knowing,

[1181]

intelligent and voluntary waiver of his rights, you must cast aside and completely ignore any such words uttered by him after he came into police control and custody.

If you decide that there was a knowing, intelligent, voluntary waiver, you must next decide what, if any, effect the words or statement in question should be given in this case. Then, the usual means of determining truth, falsity and believability, as I have already instructed you, should be applied. But I must once again caution you: The mere fact that you believe the words or statement are true is not enough to justify your considering it in the case. Even a complete confession, which is true in every detail, but has been extracted from a defendant by torture, coercion, promises, trickery or subterfuge, or in violation of his rights under our laws and constitutions, cannot be used against him. This is the defendant's protection and your protection, and though I do not assert

[1182]

that such were used in this case, nevertheless these are questions of fact for your decision. I do charge you to consider them well and give them utmost thought and care in arriving at your determination.

A defendant's alleged confession can be given in evidence against him, if the circumstances surrounding its giving by the defendant meet constitutional requirements. The People have here presented, and I have admitted in evidence, a certain signed statement, claimed to have been made and signed by the

defendant, which they claim is a confession of the crime charged against him. Whether it is or not is for you, as judges of the facts, to determine. I have determined that it meets constitutional requirements and have permitted it to be brought before you, but it is for you to evaluate it and decide what effect it is to have on your final verdict in this case.

This confession does not conclude

[1183]

anything as to the defendant's guilt or innocence. The fact that the District Attorney says it establishes guilt does not mean that it does. You must first so decide, and in so deciding, you must follow the rules of law in which I instruct you.

A confession alone does not justify a verdict of guilty. If there were absolutely no other evidence in the case beside a confession, the indictment would have to be dismissed. The confession, to sustain a conviction, must be b ted up or supported — "corroborated" is the lawyers' and judges' word — by additional and independent proof that the crime charged has in fact been committed.

The supporting proof does not have to be complete, nor does it even have to tie the defendant to the commission of the crime. It need not be so complete that it eliminates and excludes every reasonable possibility other than the defendant's guilt. But it must show, directly or

[1184]

circumstantially, that the crime in question was actually committed by someone.

Here, the People claim that they have supplied such evidence in the following testimony:

Murray Collins testified that he loaned the defendant his .22 rifle, People's Exhibit No. 21, along with a few shells, the afternoon of December 27, 1970 and that thereafter at about

8:45 o'clock later in the same day the defendant brought the same rifle back to him at his residence in Arkport; and that Trooper Robert Horn, a ballistics expert, testified that the two shells found at the Rooks residence were both fired from the same rifle, Prosecution's Exhibit No. 21.

You will recall that Roberta Rooks Patterson described her eye witness account of the entrance of the defendant into the Rooks' home the evening of December 27, 1970 at about 8:00 o'clock and that the defendant had a rifle and did fire two
[1185]
shots and John Northrup fell to the floor wounded.

The defendant does not controvert this and says that he did borrow the .22 rifle from Murray Collins, which was admitted in evidence, and that he, after seeing how his wife was dressed in the presence of John Northrup at the Rooks home, became very upset and with the loaded gun in his hand came through the door and the gun went off, and a few moments later told his wife: "Bobbi, I think I just killed a man."

This question then becomes yours, like all the other matters of fact, and you are, in reaching your verdict, to decide whether any, or how much, value is to be placed on the purported confession in determining whether the defendant is guilty or not guilty.

You will recall that the witnesses, Trooper Robert Horn and Dr. William Libertson, gave testimony concerning their qualifications as experts in the fields of
[1186]
ballistics and of psychiatry, respectively, and when a case involves a matter of science or art, requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and Jury. The opinion stated by each expert who testified before

you were based on particular facts, as the expert himself observed them and testified to them before you, or as the attorney who questioned him asked him to assume. You may reject an expert's opinion if you find the facts to be different from those which formed the basis for the opinion. You may also reject his opinion if, after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules
[1187]
concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion, is entitled to such weight as you find the expert's qualifications in his field warrant, and must be considered by you, but is not controlling upon your judgment.

The case which you have heard, and in which you will soon retire to deliberate and formulate your verdict, involves the death of a human being, and the indictment of the defendant for murder. But you must always remember that although a human life has been lost, and the law has always been zealous in guarding the sanctity of human life, this fact alone does not mean, necessarily, that a crime has been committed. That is the reason why you are here, and why you will soon begin your deliberation, to determine whether it has and, if so, what crime.

Murder, the offense for which the defendant has here been indicted, is the
[1188]
most serious of a group of offenses in our law which go by the name of homicide. Our law, Section 125.00 of the Penal Law, defines homicide as "conduct which causes the death of a person under circumstances constituting" murder or one of the other named homicidal crimes. So it is not the death alone which

makes the crime, but also the circumstances which bring it within the ban of the law.

There may, indeed, be a death, and it may be caused by some conduct of the defendant and, yet, it may be neither murder nor any other homicide, and the defendant may be innocent of any crime. Thus, for example, if the death results under circumstances in which the defendant's acts are lawfully justified, or if the defendant is not, under the circumstances, responsible in law for his acts, or if the circumstances indicate the lack of some fact or factor which the law says is necessary for guilt, or if the necessary

[1189]

facts are not proved beyond a reasonable doubt, we may then have death without criminal liability, or a killing without a crime.

It is therefore your duty to examine not only the fact of killing and of death, but also the circumstances surrounding it, before you can determine whether or not the defendant is guilty of the crime charged, or of some lesser crime, or of no crime at all.

Now Members of the Jury, as I have already told you, the defendant here is charged in the indictment with the crime of murder. The sections of the law applicable to the case are as follows:

Section 125.25 of the Penal Law of this state reads as follows so far as it concerns your attention:

A person is guilty of murder when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in

[1190]

any prosecution under this subdivision, it is an affirmative defense that (a) the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable

explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, Manslaughter in the first degree or any other crime.

The defendant has been indicted for murder, it being alleged that with intent to cause the death of another person, to wit: John Northrup, he did cause the death of such person. The Prosecution has presented evidence intended to sustain this allegation and to establish that the defendant's acts, leading up to the firing of the gun and shooting, which caused the

[1191]

victim's death, were done with intent to cause his death. The defense has sought to convince you that he had no intention whatever to cause the victim's death, or to cause any person's death, and that what happened was the result of circumstances and inadvertence neither planned nor intended.

There are several kinds of murder, different kinds of situations, in which the law says that the killing of a human being, or causing his death constitutes this most serious of all our criminal offenses. The one before you today, in the light of which you must test the evidence which has been given you, is intentional murder, and it requires, for its establishment, that the People prove to your satisfaction beyond a reasonable doubt that the defendant, with intent to cause the death of another person, caused the death of such person or of a third person.

Intent is a matter of the operation

[1192]

of a man's mind, and you cannot get within his mind and discover just what lies there with respect to his acts. You are therefore limited to the external indications of his thinking; the thoughts and intentions he actually had indicated by the things

he said and did. You need not find that an intent to kill was formed at any specific time, or even that it existed at all before the actual firing of the shots. But such intent you must find, and find proved beyond a reasonable doubt before you can bring in a verdict of guilty.

I shall now proceed to instruct you as to the nature and requirements of the intent prescribed by law for conviction of this offense.

The mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond

[1193]

a reasonable doubt that the defendant acted intentionally. In this connection, there are varying degrees and kinds of intention required to make out the different degrees of homicide, murder, or the lesser offenses called manslaughter.

Before you, considering all of the evidence, can convict this defendant or anyone of murder, you must believe and decide that the People have established beyond a reasonable doubt that he intended, in firing the gun, to kill either the victim himself or some other human being. I said some other human being, because it need not be proved that he intended to kill the very person he did kill; intent to take any person's life is enough. But intent to injure, to hurt, to harm, without killing is not enough for murder.

There can be no murder unless the killer intended to cause some person's death. To find that he had such intention, you must come to the conclusion that it was

[1194]

his conscious objective to cause death, and that his act or acts resulted from that conscious objective. If you find no such intent

to kill; if, for example, you find an intent to injure without intent to kill, you must consider one or more of the lesser degrees — as the degrees of manslaughter, for instance — the nature and requirements of which I shall summarize to you.

But one more word of caution. Always remember that you must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt. Now in connection with intent, it is plainly of

[1195]

little help to know what intent is, if you do not understand how you can determine whether or not it exists.

Intent, being a secret operation of the mind, it very naturally can seldom, if ever, be proved by direct proof. Therefore, we must necessarily test intent according to recognized laws of human nature and conduct, which allow us to judge the intent by the results, that is, by the actual conduct of the human being himself. By that standard, you are permitted to look to whatever you are satisfied beyond a reasonable doubt that this defendant did, and from that, you may infer what intent, if any, impelled or brought him to do these things. But, of course, in order to infer intent from conduct you must be first satisfied as to what the conduct was. The acts from which you are permitted to infer intent behind them must, in order words, be established before you are in any position to use

[1196]

those acts as indicating the intent with which they were done.

Because the killing of one human being by another is so abhorrent to us, we invariably, when faced with facts indicating

such a killing, begin to wonder why it was done, what led one person to snuff out another's life? In other words, what was the motive? This is so common a reaction that we often hear motive discussed, in connection with a killing, as if it were a necessary factor in the law of homicide. But it is not.

You have, indeed, heard much of this very question in the trial in which you are about to give your verdict. The People have gone to some length in an endeavor to establish that the defendant had a motive or motives to cause the victim's death. The defense, on the other hand, has sought to convince you otherwise, and that there was not and could not have been such a motive.

It is now my duty, because of the
[1197]
stress the parties have laid on this matter, to instruct you that the whole question of motive is only of secondary importance. It may or may not have a bearing on the facts. It may, whether you are or whether you are not convinced that a motive existed, help your general understanding of the factual situation. But motive is not a necessary element of the proof of homicide, or any of the offenses which constitute it, and the crime may or may not be proven without any consideration of motive whatever.

Motive is not the same as intent. As to that I have already charged you, and pointed out its absolute indispensability for conviction.

Motive, it may be briefly stated, is the reason, or what the person considered to be a reason, for causing death. Intent, on the other hand, may be found on proper evidence whether or not there was any such reason. So do not let yourself be beguiled by
[1198]
the will-o'-the-wisp of motive. On the other hand, do, for I have already informed you that you must, give much serious thought

to proof of the intent to cause death, or to cause injury, as far as you find that it was brought out in the evidence before you.

In have explained to you the essentials of intentional murder, and instructed you that, under the present indictment, you must find that there was an intention to cause the death of the person actually killed, or some other person, before you can find this defendant guilty as here charged.

In the course of the trial, the defendant testified, and produced evidence which his counsel has urged was established, that his acts were done in the "heat of passion," as the time honored expression puts it. The point of such proof is to convince you, and you must consider it to determine whether you believe it establishes,
[1199]
that the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance.

What actually happened here is clear, although there are some minor discrepancies between the stories told from the witness stand. The defendant and his wife had been having marital difficulties for some time. The defendant says that he had suspected for some time that his wife was involved with John Northrup.

The People on the other hand contend that he had known for some time that his wife was having an affair with John Northrup or at least had heard or been informed of gossip to that effect, and had actually expressed himself about it.

But defendant denies specific intent — he says he acted in the "heat of passion" — that when he saw the car of John Northrup's

[1200]
in the Rooks' driveway he became mad, and when moments later he saw his wife in the Rooks' home dressed in a blouse and slip in the presence of John Northrup, he became very upset, he went into the house, the gun went off and the next thing he remembered he told his wife he thought he had shot a man. He contends, therefore, that he acted under the influence of extreme emotional disturbance.

This is what we call, and what the law has designated as, an affirmative defense. That means that if you believe that the defendant acted under extreme emotional disturbance, and that there was a reasonable explanation for its existence at that time and place and under those circumstances, you cannot find him guilty of murder. You may, of course, on further examination of the evidence, decide that there was manslaughter in the first degree, as I shall instruct you, but you cannot find murder if, indeed, you believe this.
[1201]
I need not define the words, "extreme emotional disturbance," to you; they are self-evident in meaning. That it was "extreme" precludes mere annoyance or unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it. But you must also consider whether, in the light of what the situation then was, and what the defendant then believed it to be, and from his viewpoint at the time, it is reasonable to assume that he actually did pull up the gun and fire it under such influence. The question is not what you would have done then. Nor is it what would have been the right, legal or logical thing to do. The question is, rather, do you, in the light of your knowledge and experience with human beings, with what you believe the defendant was and saw and thought and knew, find that his claim that he acted under the influence of extreme emotional disturbance is reasonable, and

[1202]
is a reasonable explanation or excuse. If so, you must move on from consideration of murder to the other offense defined; if not, you must ignore the defendant's affirmative defense in arriving at your verdict.

In this connection, there is one other consideration. I have already instructed you that, generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you
[1203]
both that he was so emotionally influenced, and that it is a reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence.

The defendant here has raised the affirmative defense of "extreme emotional disturbance."

Section 25.00 of the Penal Law titled "Defenses: Burden of Proof," reads as follows: Subdivision 2, "When a defense declared by statute to be an affirmative defense is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

Now, Members of the Jury, in view of the requirements of the Penal Law which I just read to you, the defendant must establish such defense not beyond a reasonable doubt but by a

preponderance of the evidence, and the measure of proof required by our law is defined as follows:
[1204]

As to the preponderance of the evidence it is the quality of the testimony and not its quantity which guides you in your deliberations. By a preponderance of the evidence we do not mean the greater number of witnesses, we mean the greater weight of the believable (credible) testimony and evidence which has been brought here during the course of this trial as to the defense of extreme emotional disturbance.

You might consider in determining this, if you will, an imaginary scale, and after you have sifted out the evidence, place the believable and credible evidence in favor of the defendant as to the issue of his defense of extreme emotional disturbance on the one side of the scale and the believable and credible evidence in favor of the prosecution on that particular issue on the other side of the scale. And if in your judgment and your judgment alone, the scale tips in favor of the defendant, then he has sustained his burden of proof as to
[1205]
the defense of extreme emotional disturbance. On the other hand, if the scale is evenly balanced, or, if it tips in favor of the prosecution, then the defendant has failed to establish his burden of proof as to that particular fact.

The defendant is being tried under an indictment charging him with murder. The law of our state provides that where an indictment for a crime consists of different degrees the Jury may find the defendant not guilty of the crime charged in an indictment but guilty of a lower degree of such crime. It therefore becomes necessary for this Court to charge you not only concerning the crime of murder, but also concerning the lesser degree of homicide, which consists of manslaughter in the first degree. I do charge you that where it appears from the evidence that the defendant has committed a crime or crimes, and there is

a reasonable doubt in which of the degrees he is guilty, he can be convicted of the
[1206]
lower degree only.

Section 125.20 of the Penal Law is titled "Manslaughter in the First Degree" and provides as follows:

A person is guilty of manslaughter in the first degree when: 1. With intent to cause serious physical injury to another person he causes the death of such person or of a third person; or 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in Paragraph (a) of Subdivision one of Section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.
[1207]

The Court would here charge you that murder is the most serious and manslaughter in the first degree is next in seriousness.

Now, Members of the Jury, referring to Subdivision 1 which I just read to you, "with intent to cause serious physical injury to another person he causes the death of such person or of a third person," the Court would charge you that most homicides require for a conviction that the killing be intentional, although the nature and extent of the required intention may vary with the different degrees of the crime. But the killing need not result from the killer's intention to kill, and it may still be a crime if there is no intention whatever to kill, but just an intention to cause serious physical injury to another person. If it is proved to your satisfaction, beyond a reasonable doubt, that the killer

intended to cause serious physical injury to any person — not necessarily the one killed, but any person other than himself—
[1208]
then you may determine that the killing is homicidal, and return a verdict of guilty of manslaughter in the first degree.

You must note that the intention you are required to find, for such a verdict, is to cause serious physical injury — not injury of any kind, and not merely physical injury of any kind, but what the law calls serious physical injury, as I shall explain it to you. If you find that there was no intent to cause serious physical injury, the fact there there was a killing is not enough to elicit a verdict of manslaughter.

"Serious physical injury," as the law defines it, means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

Now referring to the law titled "Manslaughter in the First Degree," and to Subdivision 2 thereof, "with intent to
[1209]
cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in Paragraph (a) of Subdivision One of Section 125.25," which I previously explained to you, "The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision," the Court would charge you that when a killing is perpetrated with intent to cause death, as I have already instructed you, it may constitute murder. However, if it has further been provided that the familiar situation in

which the killing is done "in the heat of passion," as it has frequently been called, or "under the influence of extreme emotional disturbance," as the Revised Penal Law
[1210]
calls it, it is not murder. This does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person — either the person actually killed, or some other person, not himself — the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder.

Here, as in every case, it is your place and duty to determine what actually happened. Consider whether the killing, if proved to your satisfaction, was done with intention to cause the death of another person; if you so find, you must consider the assertion of extreme emotional disturbance here made. If, in fact, having found an intentional killing, you should consider whether it has been proved to have occurred under the influence of extreme emotional disturbance as I have previously explained to you. If it has, you are to
[1211]
return a verdict of guilty of manslaughter in the first degree.

If, on the other hand, you should determine that, in your own judgment and after carefully considering all the evidence, the influence of extreme emotional disturbance has not been established, you must either find the defendant guilty of murder, as I have already charged you, or find him not guilty.

When you commence your deliberations you should first consider if the defendant in fact killed John Northrup. If you find that he did not do that, then, of course, your verdict will be "not guilty" and this will end your deliberations.

If the People have satisfied you beyond a reasonable doubt that the defendant did kill John Northrup, you must consider

the question of intent, because as I have previously told you, there can be no murder unless the defendant intended to cause the death of John Northrup, and if you find

[1212]

no such intent to kill, that is, you find an intent to injure without the intent to kill, you must then consider the lesser degree, that is, manslaughter.

If you find beyond a reasonable doubt that the defendant did kill John Northrup, but that he did not intend to kill him but merely intended to cause serious physical injury to him, then you must find a verdict of manslaughter in the first degree.

I would again refer to the crime of manslaughter in the first degree, and say that if you find that the defendant killed John Northrup with intent to cause his death or with intent to cause the death of another person or persons, and if you find — not beyond a reasonable doubt but by a preponderance of the evidence — that he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, your verdict must be one of manslaughter in the first degree.

[1213]

If you find that the defendant killed John Northrup, that he did so with intent to cause his death; that he was not acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, then you must find the defendant guilty of murder.

Now, Ladies and Gentlemen, you are not concerned with punishment. The law provides that the Court must state to the Jury, that in determining the question of guilt, they must not consider the punishment, but that it rests with the Judge to set such punishments as may be provided by law.

Each counsel has summed up. Summation has an important purpose, but it does not constitute the evidence in the case and is

not a substitute for the evidence. As I have already told you, evidence comes only from the witness stand orally or in the form of exhibits admitted in evidence.

Each counsel interpreted the evidence from his own point of view. Each drew

[1214]

inferences from the evidence he asks you to draw.

Consider the summations of both counsel. If the arguments they made coincide with your own recollection of the evidence and if the inferences they drew coincide with the inferences you drew from the evidence, you may use them. If not, you are at liberty to disregard them.

It is your obligation to calmly, patiently and intelligently discuss the evidence in the case and the inferences you drew therefrom; to reason with each other; to make an honest effort to agree on the facts, and to accept the law given to you by the Court without question. While it is your individual obligation to discuss and consider the opinion of your fellow jurors, you must nevertheless decide the case upon your own individual judgment.

You are not required to surrender any conscientious views of the evidence you entertain. It is your duty to agree upon

[1215]

a verdict if possible, without the surrender of your own personal conscientious opinion and view of the evidence. But do not be arbitrary or stubborn.

Your decision must be free of sympathy and prejudice. If you render a decision based upon the evidence and the law, no matter what that decision may be, both the State and the defendant will have received their day in court.

Our law neither prefers nor exempts anyone. No innocent person should be convicted. No person whose guilt has been established beyond a reasonable doubt shall be acquitted.

Let your verdict reflect a fair, honest, intelligent and logical solution of the only issue presented to you, that is, has the guilt of the defendant on the count submitted to you been established to your satisfaction by credible evidence, beyond a reasonable doubt.

Ladies and Gentlemen, I have given
[1216]
you the law. You must accept it as I gave it. I have told you you are the judges of the facts and the credibility of the witnesses. To sum it up, if after accepting the law from the Court you are convinced beyond a reasonable doubt by the facts that each and every element of the crime charged was proven to your satisfaction, then you are duty bound to convict the defendant. If, on the other hand, the prosecution has failed to convince beyond a reasonable doubt of each and every element of the crime charged, then you are duty bound to acquit him. Your verdict must be unanimous.

I would suggest that you retire to the jury room and that you select one of your number to act as foreman so that whatever discussions or deliberations are had may be conducted in an orderly manner and also so that the foreman may report to the Court the verdict you have agreed upon.

* * *

[1220]

(Whereupon, at 1:25 P.M. a recess was taken until the coming in of the Jury.)

* * * * *

(Whereupon, at 3:21 P.M. Court reconvened.)

(Whereupon, the Jury returned to the courtroom.)

* * *

[1222]

THE COURT: Members of the Jury, we have your request. No. 1, you are asking for the psychiatric report.

The Court would advise you that that was not introduced in evidence. That is one thing you cannot have.

Also, you have in the second part of your request asked for a discharge. I assume you mean the discharge of the defendant from service?

THE FOREMAN OF THE JURY: Yes.

THE COURT: Have you elected a foreman?

THE FOREMAN: Yes. Military service, we wanted more of his military service.

THE COURT: There was no discharge put into evidence.

THE FOREMAN: That was not included in the GSA report?
[1223]

THE COURT: No. We are going to give you that report.

THE FOREMAN: Okay.

THE COURT: To my knowledge, there was no discharge introduced into evidence and received.

THE FOREMAN: Okay.

THE COURT: The GSA report we have here and you can take it back into the jury room with you.

Possibly, it might be wise if you took all of the exhibits in. Do you wish to have them?

THE FOREMAN: Yes.

THE COURT: Both counsel have agreed, as far as they are concerned.

You have also requested that the last portion of the charge to the Jury be read.

Can you advise the Court where you wish to have it start? Do you know?

A JUROR: The last half hour, about the last half hour.

THE COURT: Do you know what part of it you desire? I mean where you want to start.

[1224]

A JUROR: I wanted the clear definition of the charges.

THE COURT: Is that after the Court's charge in regard to motive, do you remember?

A JUROR: Yes.

A JUROR: I think what he meant was motive.

THE COURT: We have that.

A JUROR: Yes.

THE COURT: Would you, by chance, mean where the Court charged you, "When you commence your deliberations you should first consider if the defendant in fact killed John Northrup"?

THE JUROR: Start right there.

THE COURT: We will have the Reporter read it, if that is what you are seeking. If there is something different, we will further read to you.

Whereupon, the following was read:

(Commencing at line 11, p. 1211 to line 22, p. 1216) (Page A-)

* * *

[1230]

A JUROR: Your Honor, is there any reason why we could not have a copy of that, just that portion there, approximately the first two pages that he read?

THE COURT: I do not think you can have a copy of it, Mr. Juror, but if you want to, you may make notes, yourself.

A JUROR: I have.

THE COURT: You may share the notes with the rest of the Jury, if you so desire.

But you can have it read back as often as you want if you think it is necessary.

* * *

[1232]

THE COURT: Members of the Jury, you may retire now.

The Court will be recessed pending the return of the Jury.

(Whereupon, at 3:38 P.M. a recess was taken until the coming in of the Jury.)

* * * * *

(Whereupon, Court reconvened at 6:25 P.M.)

* * *

[1234]

(Whereupon, at 6:28 P.M. a recess was taken until the coming in of the Jury.)

* * * * *

(Whereupon, Court reconvened at 10:32 P.M.)

(Whereupon, the defendant was present.)

(Whereupon, Jury was polled and 12 members were present.)

THE CLERK: Mr. Foreman, have you agreed upon your verdict?

THE FOREMAN: Sir, we have had much discussion, we have taken four ballots and we do not have a unanimous decision.

THE COURT: Do you think, Mr. Foreman, and Members of the Jury, that in an additional half hour you might be able to do it? I am not forcing the issue. If you do not, we have
[1235]
made arrangements for you to stay tonight here in Corning.

Do you think you would rather wait and continue your deliberations in the morning? Is that agreed amongst the members of the jury?

Well, it appears that you cannot reach a verdict tonight, you do not think?

THE FOREMAN: I don't think so.

THE COURT: Then you will cease your deliberations. We have made arrangements — we are waiting for two officers to come, and your transportation.

I would say to all of you, do not talk with anybody about this case in any sense of the word, no matter who it might be, whether it be the sheriff's deputies who might be there or your attendants.

You can start your deliberations when you get back here in the morning at 10:00 o'clock. The Jury will be excused.

* * *

[1236]

You may retire to your jury room. We have made arrangements and as soon as the transportation gets here we will let you know.

A JUROR: Your Honor, can we have a copy of his testimony for the morning, at 10:00 o'clock?

THE COURT: We will read it to you, sir. We will read it to you if you want it. We will read it the first thing in the morning when you get here.

(Whereupon, at 10:38 P.M. a recess was taken.)

* * * * *

(Whereupon, Court reconvened at 10:42 P.M.)
[1237]

* * *

(Whereupon, two deputies were sworn to take the Jury in their charge.)

* * *

[1238]

(Whereupon, at 10:44 P.M. a recess was taken until June 8, 1971, at 10:00 o'clock A.M.)

* * * * *

[1240]

(Whereupon, Court reconvened at 10:20 A.M.)

(Whereupon, Jury polled and 12 members present.)

THE CLERK: The defendant Gordon G. Patterson Jr.?

THE DEFENDANT: Here.

THE CLERK: District Attorney John M. Finnerty?

MR. FINNERTY: Here.

THE CLERK: Defense counsel, Charles P. Knapp?

MR. KNAPP: Here.

THE CLERK: Have you agreed upon a verdict or do you wish instructions?

THE FOREMAN: We would like to hear those two items that we sent out.

THE COURT: Mr. Cramer, we want to make sure what you want to hear.

You state here, "Defendant's testimony from the time after leaving Mr.," — you have it "Merrills," and I assume you mean "Morrells' home"—

THE FOREMAN: Yes.

THE COURT: — "at Bath."

THE FOREMAN: Right.

[1241]

THE COURT: — "until taken in custody at Arkport"?

THE FOREMAN: Yes, sir, just that section if we could.

THE COURT: We have examined the testimony, the direct testimony of Mr. Knapp in questioning the defendant, and we find nothing in the testimony which mentions the name of Morrell. The testimony leaves off where the defendant talked with Buffalo, a Dr. Holland, and then the question reads: "Did you go to Cold Springs Road on the evening of December 27th," — that is the next apparent direct question, where the defendant is going to the Cold Springs Road. Is that what you members of the jury are interested in hearing?

THE FOREMAN: Yes, sir. In part of his testimony we understood that he came from Mr. Collins' place to the place in Bath, which was Mr. Morrell's place, to borrow a shotgun, supposedly. We would like to pick up his testimony at that place and carry on through until he was picked up in custody—

[1242]

his own testimony, we understood, when he was on the stand.

THE COURT: Well, Members of the Jury, we have looked for what you have asked for and we find it not in the testimony.

We do find in the confession, Exhibit No. 23, what you are asking about, I think.

THE FOREMAN: Your Honor, is this his confession at the police headquarters?

THE COURT: Yes.

THE FOREMAN: Or troop headquarters?

THE COURT: Yes.

THE FOREMAN: We were in reference to another part, but, I mean, we have that, where he came from Mr. Morrell's place and he went to the Cold Springs area on through to Arkport.

THE COURT: Mr. Knapp, I think that is probably what Mr. Cranmer is asking about. Do you have your copy?

MR. KNAPP: No.

THE COURT: It is Volume 12, page 961, question 12.

MR. KNAPP: In response to your Honor's question, I think that is where the reference is made

[1243]

to Cold Springs Road.

THE COURT: I think, Members of the Jury, that is what you are interested in hearing.

THE FOREMAN: Yes, I think so.

THE COURT: Mr. Finnerty, do you have your copy there?

MR. FINNERTY: Yes.

THE COURT: I assume that is what they are thinking of.

MR. FINNERTY: This must be the point, your Honor, yes.

THE COURT: We will clear that now, if the Reporter will read that portion of the testimony, down to the cross examination. Page 961, question 12, through 964, line 14.

I assume that is what they mean, Mr. Knapp, and I will have that read by the Reporter.

(Whereupon, the following was read:

"Q. Did you go to Cold Springs Road on the evening of December 27th with the intention of killing anyone? A. No, I did not.

"Q. What happened when you went to the
[1244]
Cold Springs Road? A. I drove past the house. I saw John Northrup's car in the driveway. I proceeded down the road — not very far. I turned the car around. Then I parked the car. I got out of the car and I was upset. There was a gun in the car. I took the gun out of the car.

"I walked towards the house. As I walked towards the house, I loaded the weapon. I chambered a round.

"I got to the Rooks residence. I went up to the back door. I started in the back door, and I looked in and my wife was in the living room. I walked around to the side window, around the back of the house. I looked in the window. I saw John Northrup seated in a chair. I saw my son Todd in a walker. I saw my wife standing by the couch in a blouse and a slip.

"Q. Then what happened? A. I was upset. The next thing that I can recall, I was coming through the door, the gun
[1245]
went off.

"The next thing I can recall is my wife saying to me, 'Skip, you do love me, don't you? You have proved to me how much you love me.'

"I said to her, 'Bobbi, I think I have just killed a man,' but she said, 'Skip, you really do love me, don't you?'

"The next thing I recall I heard the baby cry, my wife was on the floor, I was on the floor. I was choking her. She was gasping for breath. She was almost unconscious, I would say, and I was saying to her over and over again, 'Repent, Bobbi, I love you.'

"After this I came to my senses, so to speak, came in control of myself.

"My wife put her arms around my neck. I lifted her up, asked her if she was all right. She said, 'Yes, Darling, I am.' She said, 'Skip, let's get out of here,' she says, 'I don't want to stay here.'

"I said, 'All right.'
[1246]
"We both went out the door. John Northrup's car was parked in the driveway. I said, 'Come on, we will take John's car.'

"We got in. There were no keys for John's car. I asked my wife where the keys were. She said, 'John has them.'

"I asked her if she would go in and get them. She did. I followed her back in the house. She got the keys out of John's pocket. We went out.

"She wanted to drive the car. She didn't think I was able to drive it. I told her that I didn't think she was able to drive, that if anybody could drive the car that I think that I could drive it the best at that stage.

"We got in the car. We had trouble starting. From there I backed out of the driveway. I drove down the

road. Something came to me and I said to myself, 'Skip, you have just shot a man.'

"I drove down to where my car was parked. I got — I stopped the car, got

[1247]

out of John's car. My wife and my son and myself got in our car, the car I was using, Murray Collins' car, got in the car.

"We went up past the house. It is hard to recall exactly what happened on the trip from Bath to Arkport. I actually don't know how I ever made it. I remember some conversations with my wife. We prayed. I asked my wife to pray. I was praying, prayed for John Northrup, that somehow God would help him. If he did die that he would go to heaven. We prayed for ourselves in the future.

"Q. Did you then give yourself up? A. I did."

THE FOREMAN: That is the section.

THE COURT: Is that, Members of the Jury, what you wished to hear?

THE FOREMAN: Thank you, sir.

THE COURT: In your request numbered two, you request the same reading of the charge that was read to you yesterday?

THE FOREMAN: Yes, sir.

[1248]

THE COURT: The Court would like to know if it is the various degrees of the crime which you want to hear; is that what was read to you yesterday, that you mean, about a page and a half?

THE FOREMAN: Yes, your Honor, the degrees of —

THE COURT: Well —

THE FOREMAN: That seemed to explain it.

THE COURT: Will the Reporter read pages 73 and 74 of the charge, and then we will see if that is what you desire?

(Whereupon, the following was read:

"When you commence your deliberations you should first consider if the defendant in fact killed John Northrup. If you find that he did not do that, then, of course, your verdict will be 'not guilty' and this will end your deliberations.

"If the People have satisfied you beyond a reasonable doubt that the defendant did kill John Northrup, you must consider the question of intent, because, as I have previously advised you, there

[1249]

can be no murder unless the defendant intended to cause the death of John Northrup, and if you find no such intent to kill, that is, you find an intent to injure without the intent to kill, you must then consider the lesser degree, that is, manslaughter.

"If you find beyond a reasonable doubt that the defendant did kill John Northrup, but that he did not intend to kill him but merely intended to cause serious physical injury to him, then you must find a verdict of manslaughter in the first degree.

"I would again refer to the crime of manslaughter in the first degree, and say that if you find that the defendant killed John Northrup with intent to cause his death or with intent to cause the death of another person or persons, and if you find — not beyond a reasonable doubt but by a preponderance of the evidence — that he acted under the influence of extreme emotional disturbance for which there was

[1250]

a reasonable explanation or excuse, your verdict must be one of manslaughter in the first degree.

"If you find that the defendant killed John Northrup, that he did so with intent to cause his death; that he was not acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, then you must find the defendant guilty of murder."

THE COURT: Mr. Cranmer, is that what the Jury wanted to hear, or is there more?

THE FOREMAN: Yes, sir.

THE COURT: Is that satisfactory?

THE FOREMAN: I think so.

THE COURT: All right. Then you may retire for further deliberations.

Do you desire to have the exhibits with you, Members of the Jury? Do you want the exhibits?

THE FOREMAN: No, it is not necessary.

THE COURT: It is not necessary, all right. The Court will again recess pending

[1251]

the return of the Jury.

(Whereupon, at 11:36 A.M. a recess was taken until the coming in of the Jury.)

* * * * *

(Whereupon, at 12:29 P.M. Court reconvened.)

* * *

[1252]

(Whereupon, at 12:31 P.M. a recess

[1253]

was taken until the coming in of the Jury.)

* * * * *

(Whereupon, Court reconvened at 2:49 P.M.)

* * *

THE CLERK: Mr. Foreman, have you agreed upon your verdict?

THE FOREMAN: Yes, your Honor.

THE CLERK: Jurors, look upon the defendant. How do you find?

THE FOREMAN: We, the Jury, have found the defendant guilty of murder as charged.

THE CLERK: Listen to your verdict, Ladies and Gentlemen of the Jury, as the Court has

[1254]

recorded it: You say you find the defendant Gordon G. Patterson, Jr. guilty of murder as charged. So say you all?

THE JURY: Yes.

MR. KNAPP: I ask the Jury be polled.

THE COURT: Poll the Jury.

(Whereupon, the Jury was duly polled, and in answer to the Clerk's query, "Is that your verdict?" replied in the affirmative.)

THE COURT: Members of the Jury, with the rendition of your verdict your service in this case, of course, is completed.

* * *

OPINION OF THE NEW YORK COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

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4 No. 70

The People &c.,

Respondent,

vs.

Gordon G. Patterson, Jr.,

Appellant.

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(70)

Betty D. Friedlander and Victor J. Rubino for appellant.

John M. Finnerty, District Attorney, for respondent.

JASEN, J.:

The principal issue on this appeal is whether, in a murder prosecution, constitutional due process limitations are invaded by placing the burden of persuasion on a defendant with respect to the defense of acting "under the influence of extreme emotional disturbance" in order to reduce the homicide to the less culpable crime of manslaughter in the first degree.

The defendant, Gordon Patterson, and his wife, Roberta, had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults. As a result of one such incident, Roberta Patterson left her husband and instituted divorce proceedings. She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to

the defendant. On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him. The defendant confessed to the killing and, after a hearing, the confession was held voluntary and was admitted into evidence against him at trial. Defendant's wife, an eyewitness to the crime, testified, over objection of defense counsel, that defendant fired two shots at the victim from close range. The defense called eleven witnesses, including the defendant, who testified in great detail as to the defendant's life and particularly that period of his life when he was married to Roberta Patterson. The defense at the trial was that the crime, if there was one, was unintentional. This was based on defendant's version of events to the effect that the gun went off accidentally. Defendant also raised the affirmative defense that at the time of the alleged crime, he was acting under the influence of extreme emotional disturbance.

The court's charge to the jury was based on the homicide provisions of the Penal Law (§§ 125.25 [subd (1)(a)][1] , 125.20

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[1]Penal Law, section 125.25 (subd [1][a]):

"*§ 125.25 Murder in the second degree*

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or * * * *"

[subd (2)][2]). The jury was instructed that "[t]he mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond a reasonable doubt that the defendant acted intentionally." The People were required to establish beyond a reasonable doubt that the defendant "intended, in firing the gun, to kill either the victim himself or some other human being." To find intent, the jury had to conclude that the defendant had the "conscious objective to cause death, and that his act or acts resulted from that conscious objective." The jury was cautioned that they "must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

With respect to the defense of extreme emotional disturbance, the court stated that the point of this evidence was to convince

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[2]Penal Law, section 125.20 (subd [2]):

"*§ 125.20 Manslaughter in the first degree*

A person is guilty of manslaughter in the first degree when:

* * * *

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; * * * * "

the jury, by a preponderance of the evidence, that "the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." The court did not elaborate on the definition of "extreme emotional disturbance", noting that the words are "self-evident in meaning". However, the court cautioned that " 'extreme' precludes mere annoyance or unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it." As to the burden of proof, the court repeated its earlier instruction that "generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse."

Finally, the court instructed the jury that "[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree * * * *". The court went on to explain that "[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide, but is punishable in less severe manner than

murder." No objection was taken to the above quoted portions of the court's charge.[3]

The jury found the defendant guilty of murder. The Appellate Division unanimously affirmed the judgment of conviction.

During the pendency of this appeal, the United States Supreme Court decided the case of *Mullaney* v. *Wilbur* (421 US 684), wherein the court, passing on a Maine statute, held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (421 US at p 704.) Defendant argues that *Mullaney* is controlling in this case and requires the striking down of Penal Law sections 125.20 and 125.25 to the extent that they require a defendant charged with murder to bear the burden of proving the affirmative defense that he acted under the influence of extreme emotional disturbance.

At the threshold we are confronted with two procedural issues. The first is whether the defendant has preserved a question of law for our review, and, secondly, even if he has, whether *Mullaney* should be applied retroactively to a trial already completed. The defendant's constitutional contentions are based entirely upon a reading of the *Mullaney* decision. The jury was charged by the court on June 7, 1971, four years and two days in advance of *Mullaney*. At that time none of the various affirmative defenses contained in the 1967 revision of the Penal Code had yet been attacked on due process grounds. (See *People* v. *Laietta*, 30 NY2d 68, cert den 407 US 923

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[3]The only objection taken to the charge was that the jury could "infer" from the court's instructions that its only choice was between murder and manslaughter, whereas the jury could acquit the defendant. We note that the court's instructions are not susceptible to any such "inference" and that this point is not advanced by the defendant on appeal.

[affirmative defense of entrapment].) In May 1973, when the Appellate Division affirmed the judgment of conviction, there was no intimation that the homicide provisions might be vulnerable to serious constitutional challenge. In fact, the initial brief filed by appellant in our court did not raise a due process argument. The point was raised for the first time in a supplemental brief prepared after *Mullaney* was handed down.

Our court, with a narrow exception applicable in capital cases, is strictly a law court. A failure to object to a charge at a time when the trial court had an opportunity to effectively correct its instructions does not preserve any question of law that this court can review. (CPLR § 470.05, subd 2; *People* v. *Robinson*, 36 NY2d 224, 228.) Strict adherence to the requirement that complaint be made in time to permit a correction serves a legitimate state purpose. (*Henry* v. *Mississippi*, 379 US 443, 447.) A defendant cannot be permitted to sit idly by while error is committed, thereby allow the error to pass into the record uncured, and yet claim the error on appeal. Were the rule otherwise, the state's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant. While the review by this court is restricted, on the initial appeal to the Appellate Division, that court, with its broader powers of review, may consider claims of error, notwithstanding a failure to object. (CPL § 470.15; *People* v. *Robinson*, *supra*.)

There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law. (*Cancemi* v. *People*, 18 NY 128, 138; *People ex rel. Battista* v. *Christian*, 249 NY 314, 319.) In *Cancemi*, it was held that a defendant could not consent to being tried by a jury of less than twelve members. In *People ex rel. Battista* v. *Christian* (*supra*), the

court ruled that an information charging a defendant with an "infamous" crime was a nullity, despite defendant's consent, where the State Constitution provided that infamous crimes could be prosecuted only by grant jury indictment. Thus, the rule has come down to us that where the court had no jurisdiction, or where the right to trial by jury was disregarded, or where there was a fundamental, nonwaivable defect in the mode of procedure, then an appellate court must reverse, even though the question was not formally raised below. (*People* v. *Bradner*, 107 NY 1, 4-5; see *People* v. *Miles*, 289 NY 360, 363-364.)

This traditionally limited exception has, on occasion, been given broader expression. In *People* v. *McLucas* (15 NY2d 167), the defendant did not object to a comment by the trial court on his failure to testify. Our court ruled that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right." (At p. 172.) Since the defendant's right against self-incrimination had been violated, the judgment of conviction was reversed.

As we view it today, the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by constitution and statute. Where the procedure adopted by the court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted. As we stated nearly fifty years ago, "prosecutions must be conducted in substance and without essential change as the Constitution commands." (*People ex rel. Battista* v. *Christian*, 249 NY 314, 319, *supra*.) Defendant Patterson contends that the burden of proof on the issue of extreme emotional disturbance was improperly placed upon him. If the defendant's argument is meritorious, his trial was not conducted in accordance with the procedure mandated by state law. Our law provides that "[n]o conviction of an offense by

verdict is valid unless based upon trial evidence which is legally sufficient and which establishes beyond a reasonable doubt every element of such offense and the defendant's commission thereof." (CPL § 70.20.) If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial, the distribution of the burden of persuasion being just as significant as the proper composition of the jury. Since the error complained of goes to the essential validity of the proceedings conducted below, we believe there is a question of law that our court should review.

We also note that prior to *Mullaney*, there was no doubt in this state that the extreme emotional disturbance affirmative defense was constitutionally valid. The defendant's failure to object to a practice deemed valid in this state cannot deprive him of the right to attack that practice when an intervening Supreme Court decision calls that practice into question. (See *O'Connor* v. *Ohio*, 385 US 92, 93; *People* v. *Baker*, 23 NY2d 307, 317.) It is also significant that *Mullaney* was not handed down until well after the Appellate Division affirmed Patterson's conviction. Were we not to treat appellant's claim on the merits, Patterson would be deprived of a state forum in which his arguments could be heard. (Cf., *People* v. *Robinson*, 36 NY2d 224, 228, *supra*.)

As to the second procedural issue, we hold that the defendant may assert a *Mullaney* claim even though his conviction predates that decision. We note that *Mullaney* was based on the Supreme Court's earlier holding in *In re Winship* (397 US 358), a decision subsequently given retroactive effect. (*Ivan* v. *City of New York*, 407 US 203.) *Mullaney*, like its progenitor *Winship*, should be given retroactive effect.

We, therefore, turn to the merits of the defendant's *Mullaney* claim. In our view, the New York law of homicide differs

significantly from the Maine law struck down in *Mullaney*. We believe that the law of this State does not infringe the due process interests that *Mullaney* sought to protect.

To put the constitutional issues in focus, and to point up the differences between the law of New York and the common law approach still followed in Maine, it is necessary to review the history and development of the law of homicide in this state. As a colony, and then in early statehood, New York drew upon the English common law for its formulations of the homicide offenses. The crimes of murder and manslaughter, the only grades of culpable homicide known to the common law, were defined, and punished, in the same fashion as the English courts had for centuries. (1937 Report of N.Y. Law Rev. Comm., pp 540, 702-410.) In 1829, the Legislature codified, for the first time, the New York law of homicide. Murder was defined as a single, degreeless crime committed "[w]hen perpetrated from a premeditated design to effect the death of the person killed * * * *"[4] (Revised Statutes of New York, 1829, Part IV, Ch 1, Tit 1, § 5.) On the other hand, manslaughter was divided into four degrees. A killing committed "without a design to cause death, in the heat of passion" was a manslaughter. If the killing was accomplished in "a cruel and unusual manner", the crime was a second degree offense; if the killing was accomplished by the use of "a dangerous weapon", it was a third degree offense. An involuntary killing, "by a weapon, or by means neither cruel or unusual" in the heat of passion was manslaughter in the fourth degree. (Revised Statutes, 1829, Part IV, Ch 1, Tit 2, §§ 10, 12, 18.) As a result of this statutory change,

[4]This statute, as well as the other statutes to be discussed *infra*, contained other provisions, including the forerunners of our present felony murder and "depraved indifference" murder statutes. (See Penal Law, § 125.25 [subds (2), (3)].) However, for present purposes, it is sufficient to confine our discussion to the development of the crimes of intentional murder and voluntary manslaughter.

a "clear-cut and decisive cleavage" was made between the crimes of murder and manslaughter, based upon the presence or absence of a "design to effect death". (1937 Report of the N.Y. Law Rev. Comm., p 544, *supra.*) Moreover, where the common law had implied malice from the very fact of the homicide where a dangerous weapon had been used or the killing had been accomplished in a cruel and inhuman fashion, the New York revision deemed such acts to be manslaughter unless it could be proved that the defendant had a design to effect death. (*Id.*, at p 545.)

In 1860, following the early lead of Pennsylvania and Virginia (see Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1445), the Legislature split the crime of murder into two categories, in an attempt to alleviate some of the harsh effects of capital punishment. Murder "perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing * * *" was murder in the first degree and punishable by death. (L. 1860, ch 410, §§ 1, 2.) Any other murder was in the second degree and punishable by life imprisonment at hard labor. (L. 1860, ch 410, §§ 2, 6.)[5] In 1862, first degree murder was redefined to include killings

[5]This act inadvertently repealed, by the omission of a savings clause, the prior law defining crimes and authorizing the imposition of sentences. (L. 1860, ch 410, § 7.) in *People* v *Hartung* (22 NY 95), the court held that the 1860 statute could not, by virtue of its ex post facto effect, be given retroactive application. Since it appeared that persons accused or convicted prior to the passage of the 1860 Act might have to be released, the Legislature attempted to give the 1860 statute retroactive effect by granting defendants convicted prior to the passage of the 1860 Act or convicted of crimes committed prior to passage, the option of selecting either life imprisonment or the death penalty. (L. 1861, ch 303, § 3.) In 1862, the Legislature reverted back to the law as it stood prior to 1860. (L. 1862, ch 197, §§ 4, 5.) However, a narrowed second degree murder offense was retained. (L. 1862, ch 197, § 5.)

"perpetrated from a premeditated design to effect the death of the person killed." (L. 1862, ch 197, § 5.)

The two-tier murder offense was carried over into the Penal Code of 1881. The first degree offense was committed when the killing was perpetrated out of "a deliberate and premeditated design to effect the death of the person killed". (3 Laws of New York, 1881, § 183[1].) The second degree offense was newly defined as a killing "committed with a design to effect the death of the person killed * * * but without deliberation and premeditation." (3 Laws of New York, 1881, § 184.) The punishments remained death and life imprisonment, respectively. (3 Laws of New York, 1881, §§ 186, 187.) The four degrees of manslaughter were reduced to two. A killing, "[i]n the heat of passion, but accomplished in a cruel and unusual manner or by means of a dangerous weapon" became manslaughter in the first degree, punishable by an imprisonment of between five and twenty years. (3 Laws of New York, 1881, §§ 189 [subd (2)], 192.) A heat of passion killing not committed by use of a deadly weapon or by a cruel and unusual means was a second degree offense, punishable by imprisonment of one to 15 years and/or a fine not in excess of $1,000. (3 Laws of New York, 1881, §§ 193 [subd (2)], 202.) The Penal Law of 1909, the immediate precursor of our present statute, retained the same definitions, with some alteration in the punishments to be meted out. (Former Penal Law, §§ 1044[1], 1045, 1046, 1048, 1050[2], 1051, 1052[2], 1053.)

From this historical review, two points are made abundantly clear. First, New York, since its first statutory enactment in 1829, has always defined murder and manslaughter as separate and distinct offenses with punishments varying to fit the degree of the crime. Maine, on the other hand, has remained truer to the common law by defining but one generic category of felonious homicide, holding out a possibility of mitigation only

in the form of punishment. Secondly, ever since 1829, New York has refused to imply malice from the act of killing, requiring the prosecution to establish, where it seeks to prove a murder, that the defendant possessed a design to effect death. Thus, in *Stokes* v. *People* (53 NY 164), the court held that "[m]ere proof of the killing did not, as a legal implication, show" that the defendant committed the killing from a premeditated design to effect a human death. (At pp 179, 180.) This, again, is in contradistinction to the law of Maine struck down in *Mullaney*. (421 US at p 686, n 4; *State* v. *Lafferty*, 309 A2d 647, 965.) In *Stokes*, the court, in noting that the common law of England implied malice from the proof of killing only, cited the American case most often referred to for that principle, *Commonwealth* v. *York* (50 Mass [9 Metcalf] 93) (53 NY at p 179). The law of Maine is still based on a *York* approach (see 421 US at pp 695, 696), an approach rejected in *Stokes* as in contradiction to the New York statutes (53 NY at p 179).

In 1961, a study commission was appointed to thoroughly review and update penal statutes that had not been subjected to a full scale examination since the 1881 Penal Code. The Revised Penal Law of 1967, the end product of the Commission's work, contained new homicide provisions reflective of contemporary thought, to replace an anachronistic statute replete with concepts whose validity had been substantially eroded by time. Thus, the factors of premeditation and deliberation were discarded entirely. These two concepts, which alone distinguished first degree murder from second degree murder (and therefore death from life imprisonment), had become completely nebulous. (Third Interim Report of the Temporary Commission on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. 1964, No. 14, p 22.) In the words of Mr. Justice Cardozo, "[i]f intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and

premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words." (Cardozo, Law and Literature, pp 100-101; see also Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1445-1446.) The revised 1967 statute made murder a single, degreeless crime, requiring that the defendant, "[w]ith intent to cause the death of another person, * * * causes the death of such person or of a third person." (Penal Law, § 125.25.)[6]

The manslaughter provisions in the former Penal Law were also substantially revised. Under the old provisions, manslaughter was a fatal assault committed without homicidal intent, without a design to effect death. (Former Penal Law, §§ 1050, 1052.) "Heat of passion" had become, not a mitigating factor that would reduce a murder to manslaughter, but an affirmative element of a specified type of manslaughter. In its

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[6]In 1974, the Legislature added a new crime, murder in the first degree. (Penal Law, § 125.27.) This statute comes into operation where the victim of the murder is a police officer, an officer in a correctional facility or where the defendant was incarcerated for a life sentence. A convicted defendant is to be sentenced to death. (Penal Law, § 60.06.) As part of this enactment, section 125.25, which formerly defined the degreeless crime of murder, was retitled, without a change in substance, murder in the second degree. (L. 1974, ch 367, § 4.)

It is noteworthy that the new first degree murder offense also provides that the defendant may assert the affirmative defense of extreme emotional disturbance. (Penal Law, § 125.27[2][a].) Successful interposition of the defense would reduce the crime to manslaughter in the first degree, not to murder in the second degree.

proposed statute, the Commission suggested the elimination of the "hybrid offense" that had developed in New York, coupled with a return to the traditional principles of mitigation. (Notes of the Staff of the State Commission on Revision of the Penal Law and Criminal Code, 1967 Gilbert, Criminal Law and Practice of New York, pp 1C-1, 1C-61—1C-62.) The Commission also replaced the traditional language of "heat of passion", with a new formulation, "extreme emotional disturbance". In this respect, the Commission adopted the manslaughter provisions in the Model Penal Code. (Model Penal Code, § 201.3 [subd (1) par (b)].) This change was designed to avoid limiting mitigation to the situation where a defendant, provoked, acts "under the influence of some sudden and uncontrollable emotion excited by the final culmination of * * * misfortunes * * * *" (*People* v. *Caruso*, 246 NY 437, 446.) The new formulation does not impose so arbitrary a limit on the nature of circumstances that might justify a mitigation. (Model Penal Code, § 201.3, Comment, pp 46-47 [Tent. Draft No. 9].)

The original 1964 proposal of the Commission did not, as the Model Penal Code does not, expressly state that the burden of establishing mitigating circumstance is upon the defendant. To clarify the situation, the 1965 proposal, ultimately enacted, made extreme emotional disturbance an affirmative defense to be proved by the defendant. The 1965 bill made no other substantive changes. (Fourth Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. 1965, No. 25, pp 29-30.)

The present Penal Law thus provides that it is an affirmative defense to a murder prosecution that the "defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse * * * *" (Penal Law, § 125.25 [subd (1), par (a)].) The defense must be

established by a preponderance of the evidence. (Penal Law, § 25.00 [subd (2)].) If the defense proves successful, the defendant may not be found guilty of the crime of murder, but only of the crime of manslaughter in the first degree. (Penal Law, § 125.20 [subd 2].) The sentences that might be imposed for these crimes differ significantly. (See Penal Law, § 70.00.)

We conclude that the New York statutes do not infringe the due process interests which *Mullaney* v. *Wilbur* (421 US 684, *supra*) sought to protect. The Due Process clause of the Federal Constitution requires that a conviction cannot be had unless the prosecution proves beyond a reasonable doubt "every fact necessary to constitute the crime" with which a defendant is charged. (*In re Winship*, 397 US 358, 364.) In New York, the prosecution, in order to obtain a conviction for murder, must prove beyond a reasonable doubt that the defendant, with intent to cause the death of another person, did cause the death of such person or of a third person. (Penal Law, § 125.25 [subd 1].) With respect to intent, the People must establish that the defendant's conscious objective was to cause the death of the other person. (Penal Law, § 15.05 [subd 1].) Intent may not be inferred from the simple fact of killing, but must be proved by other facts. That New York will permit the defendant to establish the existence of mitigating circumstances, collateral to the principal facts at issue, does not detract in the smallest degree from the rule, long established in this State, that the prosecution must prove intent beyond a reasonable doubt.

The law of Maine, under consideration in *Mullaney*, did not make the "facts of intent" general elements of the crime of felonious homicide. (421 US at p 699.) Rather, the degree of intent was relevant only to punishment. (*Id.*) Even then, the prosecution was permitted to rely upon a presumption of malice, to be drawn from the fact of a killing. If the defendant acted under the heat of passion on sudden provocation, malice afore-

though was negated since, under Maine law, as well as under the common law, malice and heat of passion are mutually inconsistent. (421 US at pp 686-687.) That is to say, if the defendant's mind was possessed by malice, his actions could not have resulted from an inflamed passion aroused by a sudden provocation. Under Maine law, malice and heat of passion are reflective of the defendant's intent, and the state could not constitutionally provide the prosecution with a presumption of malice and then require the defendant to negate it with proof that he acted under the heat of passion. (421 US at p 702.)

In New York, the prosecution is at all times required to prove, beyond a reasonable doubt, the facts bearing the defendant's intent. That the defendant acted because of an extreme emotional disturbance does not negate intent. The influence of an extreme emotional disturbance explains the defendant's intentional action, but does not make the action any less intentional. The purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them. (See Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1446, *supra*.) The opportunity opened for mitigation differs significantly from the traditional heat of passion defense. Traditionally, an action taken under the heat of passion meant that the defendant had been provoked to the point that his "hot blood" prevented him from reflecting upon his actions. (See, e.g., *People* v. *Ferraro*, 161 NY 365, 375.) Furthermore, the action had to be immediate, for if there was time for "cooling off", there could be no heat of passion. (See, e.g., *People* v. *Fiorentino*, 197 NY 560, 563.) An action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a

defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore. The differences between the present New York statute and its predecessor and its ancient Maine analogue can be explained by the tremendous advances made in psychology since 1881 and a willingness on the part of the courts, legislators, and the public to reduce the level of responsibility imposed on those whose capacity has been diminished by mental trauma. It is consistent with modern criminological thought to reduce the defendant's criminal liability upon proof of mitigating circumstances which render his conduct less blameworthy. So long as the prosecution must prove, beyond a reasonable doubt, that the defendant intended to kill his victim, it is not a violation of due process to permit the defendant to establish he formulated his intent while "under the influence of extreme emotional disturbance."

Our dissenting brethren would draw a contrary conclusion based upon a broad reading of selected portions of the *Mullaney* opinion. We recognize that some of the language in *Mullaney* might, by a process of extrapolation, be applied to the provisions of the New York Penal Law. To be sure, the issue is not free from doubt. Yet it must also be recognized that judicial opinions are not written and rendered in the abstract. Language is given its meaning by the context which compels its writing. It is basic to our common law system that a court decides only the case before it. While the Supreme Court in *Mullaney* struck down the Maine law of homicide, it did not reach out and pass on the constitutional validity of every state criminal statute that contains either an affirmative defense or a policy presumption. We believe, from our review of the history and development of the New York law of homicide, that New York homicide law differs significantly from the homicide law of Maine. In our view, this essential difference makes this case materially distinct

from that presented to the Supreme Court in *Mullaney*. For this reason, we do not believe that *Mullaney* mandates a holding that the affirmative defense of extreme emotional disturbance is unconstitutional (See *Mitchell* v. *W.T. Grant Company*, 416 U.S. 600 at 615). Our law does not deprive the defendant in a murder prosecution of due process of law. We also believe, for the reasons stated by Chief Judge Breitel in his concurring opinion, that the concept of affirmative defenses is sound, valuable and is one that has a place in modern penal law. We hold, therefore, that the provisions of the New York Penal Law which set forth the affirmative defense of extreme emotional disturbance are not constitutionally infirm.

The issue of whether Gordon Patterson's actions were committed under the influence of an extreme emotional disturbance was squarely presented to the jury. Although the People did not controvert the testimony of the defense psychiatrist, the jury was free to refuse to credit that testimony and to conclude, from the other evidence in the case, that the defendant had not established that his intent was formulated under the influence of an extreme mental trauma. The jury concluded that the defendant was not entitled to the mitigation permitted by statute and, on appeal to our court, from an affirmance by an intermediate appellate court, this finding is not reviewable by us. (See, e.g., *People* v. *Eisenberg*, 22 NY2d 99, 101.)

We turn now to the issue of whether Roberta Patterson, the defendant's wife, was properly permitted to testify as to the facts of the shooting and the conversation with the defendant during the ride from the scene of the crime. Although the Pattersons were, and are still, legally married to each other, the actions and words of the defendant were not protected by the marital privilege. (CPLR 4502.) Immediately after the shooting, the defendant attempted to strangle his wife. After releasing his grip

on her, he ordered her about with a rifle still clutched in his hands. "This is strong evidence that defendant himself was not then relying upon any confidential relationship to preserve the secrecy of his acts and words * * * * *" (*People* v. *Dudley*, 24 NY2d 410, 415.)

As to the other contentions advanced by the defendant, we find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed.

BREITEL, Ch. J. (concurring):

I am in complete agreement with the views expressed in the majority opinion and therefore concur in it. It seems apt, however, to add some comments respecting the salutary criminological purposes served by the development of affirmative defenses, even where the burden of proof rests on the defendant.

A preliminary caveat is indicated. It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime. Indeed, a by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf.

Nevertheless, although one should guard against such abuses, it may be misguised, out of excess caution, to forestall or discourage the use of affirmative defenses, where defendant may have the burden of proof but no greater than by a preponderance of the evidence. In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the

adjustment between offenses of lesser and greater degree. In times when there is also a retrogessive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.

The affirmative defense, intelligently used, permits the gradation of offenses at the earlier stages of prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove, if he can, the distinction between the offense charged and the mitigating circumstances which should ameliorate the degree or kind of offense. The instant homicide case is a good example. Absent the affirmative defense, the crime of murder or manslaughter could legislatively be defined simply to require an intent to kill, unaffected by the spontaneity with which that intent is formed or the provocative or mitigating circumstances which should legally or morally lower the grade of crime. The placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the "element" of mitigating circumstances is generally unfair, especially since the conclusion that the negative of the circumstances is necessarily a product of definitional and therefore circular reasoning, and is easily avoided by the likely legislative practice mentioned eariler.

The problems involved and their resolution are, of course, not confined to the crimes of homicide but extend to most serious offenses and some minor ones.

In a more mature and developed criminology sophisticated distinctions should be used freely, guarding only for abuse. The goals are more appropriate definition of and sanctions for crime, and a retreat from primitive notions about crime based on a result alone or based largely on result. "A homicide is a

homicide is a homicide" is not a truth of modern criminology and such a simplistic approach, which could be encouraged by making affirmative defenses unattractive to legislators, is not one to be followed.

The treatment of entrapment as an affirmative defense in the Model Penal Code is particularly illustrative of the discussion (A.L.I. Model Penal Code, Tent. Draft No. 9 [1959], §2.10, subd [2] and Comments at pp 14-24). The trial was followed in this State with the enactment of the new Penal Law, to introduce what had not been in this State the ameliorative entrapment defense before (see §40.05, enacted as §35.40 by L. 1965, ch. 1030, and renumbered §40.05 by L. 1968, ch. 73, §11, with the burden of proof on defendant, §25.00, subd 2; *People* v. *Laietta*, 30 NY2d 68, 73-75, cert. den. 407 US 923). Given the resistance in many places in the Legislature and even in the American Law Institute it is a fair conjecture that but for the affirmative defense *cum* burden of proof treatment, the law would not have followed this course (see Hechtman, Practice Commentaries to Penal Law § 25.00, McKinney's Consol. Laws of N.Y., Book 39, at pp 62-63; A.L.I. Model Penal Code, Tent, Draft No. 4 [1955], Comments to § 1.13, at pp 108-114, esp. p 113). In short, only those with a lack of historical perspective would treat the affirmative defense as a hardening of attitudes in law enforcement rather than as a civilized and sophisticated amelioration.

In sum, the appropriate use of affirmative defenses enlarges the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around — a shift from primitive mechanical classifications based on the bare anti-social act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, the mark of an advanced criminology.

JONES, J. (concurring):

I concur in the majority opinion.

In my view respect for the proper role of the legislative branch calls for the exercise of responsible judicial constraint in this case. Our Legislature has carefully and thoughtfully revised our State's Penal Law. In that process recourse was had to the recasting as an affirmative defense of what is now termed "extreme emotional disturbance". As is stated in the concurring opinion of the Chief Judge, the intelligent use of affirmative defenses makes eminently sound sense in the criminal law today. Thus, I am not prepared in the discharge of what I conceive to be my judicial responsibility and discipline to strike down the provision here under review because on one analysis the opinion of the United States Supreme Court in *Mullaney* v *Wilbur*, 421 US 684, would appear to call for that result. Another reading of the same opinion leads others to a different conclusion. In that circumstance, I conclude that, until there has been an explicit determination by the Supreme Court which permits us no alternative, it serves better in this case to leave to that Court the articulation of its views than for me to assume to interpret them, particularly where experience has demonstrated that my own judgment in such matters is not infallible. (Cf. *People* v *La Ruffa*, 37 NY2d 58, 62 [my concurring opinion], cert. den. 44 USLW ——; *Menna* v *New York*, 44 USLW 3304.)

COOKE, J. (dissenting):

I dissent and vote to reverse the order of the Appellate Division and to grant a new trial, on the authority of *Mullaney* v *Wilbur* (421 US 684).

Defendant was indicted and convicted after a jury trial of the crime of murder. The indictment, returned on January 15,

1971, accused "the defendant of the crime of MURDER, committed as follows: The defendant on the 27th day of December, 1970, in the Town of Urbana, County of Steuben and State of New York, did knowingly and unlawfully and with the intent to cause the death of another person, did cause the death of another person, to wit: the defendant on the aforesaid date at the Robert Rook residence in the Town of Urbana, New York, did intentionally cause the death of John Northrup by intentionally firing at John Northrup a loaded firearm thereby inflicting wounds which caused the death of said John Northrup."

The pivotal question on which this appeal turns is whether or not the New York murder statute in effect at the time of the commission of the alleged crime and at the time of trial (Penal Law, §125.25, subd 1; see ch 1030, L 1965, eff Sept. 1, 1967), which made the defense of extreme emotional disturbance an affirmative defense, violated the due process clause of the Fourteenth Amendment.

Under the old Penal Law in effect prior to September 1, 1967, there were two degrees of murder, first degree murder being distinguished from murder in the second degree by the presence of premeditation and deliberation. Section 1044 of the former Penal Law, defining murder in the first degree, provided:

> The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:
>
> 1. From a deliberate and premeditated design to effect the death of the person killed, or of another;
>
> * * *

and section 1046, furnishing the second degree definition, stated:

> Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

The revised Penal Law, as originally enacted by chapter 1030 of the Laws of 1965 and which became effective September 1, 1967, not only abandoned the degrees of murder but also eliminated the elements of premeditation and deliberation. In this respect, homicidal intent alone became the prerequisite for murder (Rothblatt, Criminal Law of New York, The Revised Penal Law, §68).

Subdivision 1 of section 125.25 of the revised Penal Law, as in effect at the time in question,[1] provided in part:

> A person is guilty of murder when:
>
> 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:
>
> (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; * * *.

---

[1] Pursuant to section 4 of chapter 367 of the Laws of 1974, effective September 1, 1974, the words "in the second degree" were added to the section title, the introductory line and the last unnumbered paragraph of section 125.25. Pursuant to section 13 of chapter 276 of the Laws of 1973, effective September 1, 1973, "A-I" were substituted for "A". Pursuant to section 5 of chapter 367 of the Laws of 1974, effective September 1, 1974, section 125.27, entitled "Murder in the first degree", was added to the Penal Law.

It should be noted that the absence of extreme emotional disturbance is not one of the elements of this type of such a crime; rather, such a disturbance is made an affirmative defense. Under this statute murder is a class A felony punishable by life imprisonment (Penal Law, §70.00 [2] [a]).

Section 125.20 of the revised Penal Law, defining manslaughter in the first degree, reads in part:

> A person is guilty of manslaughter in the first degree when:
>
> * * *
>
> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; * * *.

Attention is called to the fact that under the statute the People need not prove "under the influence of extreme emotional disturbance" in any prosecution under subdivision 2 of section 125.20. Manslaughter in the first degree is defined as a class B felony, punishable by 25 years imprisonment (Penal Law, § 70.00 [2] [b].

The statute, subdivision 2 of section 25.00 of the Penal Law, declares in regard to the burden of proof as to an affirmative defense:

> When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

Thus, under the statute, the defendant had the burden of establishing, by a preponderance of the evidence, the affirmative defense that he acted under the influence of extreme emotional disturbance. Here, the trial court charged that defendant had raised the affirmative defense of "extreme emotional disturbance" and read subdivision 2 of section 25.00 to the jury. It instructed the jury that:

> In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you both that he was so emotionally influenced, and that it is a reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence.

After this case was tried and subsequent to the Appellate Division affirmance, the Supreme Court, on June 9, 1975, rendered its decision in *Mullaney* v *Wilbur* (421 US 684). It is determinative here. It must be given complete retroactive effect, since the major purpose of its constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function (*Ivan V.* v *City of New York*, 407 US 203; cf. *United States ex rel. Castro* v *Regan*, 525 F2d 1157, 1158).

In *Mullaney*, defendant was found guilty of murder after a trial in the State of Maine. The case against him included his pretrial statement in which he claimed that he attacked the

victim in a frenzy provoked by the victim's homosexual advances. The defense argued that the homicide was not unlawful since defendant lacked criminal intent and, alternatively, that at most the homicide was manslaughter rather than murder since it occurred in the heat of passion provoked by the homosexual assault. The trial court instructed the jury that Maine law recognizes only two kinds of homicide, murder and manslaughter, the common elements of both being that the homicide be unlawful, that is, neither justifiable or excusable, and that it be intentional. After reading the statutory definitions of murder and manslaughter, the court charged that "malice aforethought is an essential and indispensable element of the crime of murder", without which the homicide would be manslaughter. The jury was further instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. It was emphasized that "malice aforethought and heat of passion on sudden provocation are inconsistent things" and, thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter.

The Maine murder statute (Me Rev State, Tit 17, §2651) provides:

> Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.

The manslaughter statute (Tit 17, §2551), in relevant part, reads:

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought * * * shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years * * *.

The Supreme Court in *Mullaney*, at page 691, viewed these Maine statutes in this fashion:

> The Maine law of homicide, as it bears on this case, can be stated succinctly: Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder — *i.e.*, by life imprisonment — *unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation*, in which case it is punished as manslaughter — *i.e.*, by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years (emphasis added).

After tracing the development of the law relating to homicide for several centuries and noting that in the last fifty years the large majority of the states have required the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt, the Supreme Court observed at page 696:

> This historical review establishes two important points. First, the fact at issue here — the presence or absence of the heat of passion on sudden provocation — has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.

In response to the argument that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant, the Supreme Court was quick to point out at page 701:

> No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential.

After laying down these premises, it comes as no surprise that the Supreme Court terminated its *Mullaney* dissertation, at page 704, with this conclusion:

> We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

That the New York statutes in question (Penal Law, §§125.20 [subd 2]; 125.25 [subd 1]) are virtually the same as the Maine law of homicide, is apparent from the Supreme Court's "succinct statement" of the latter in *Mullaney* at page 691. New York's phrase of "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse" is but a replacement for the phrase "in the heat of passion". This is demonstrated by Hechtman's Practice Commentaries (McKinney's Cons. Laws, Book 39, §125.20, pp 391, 393) in which it is stated *inter alia:*

> The meanings and significance of subdivisions 1 and 2 can be fully appreciated only against a background of certain common law principles of homicide.
>
> The common law enunciates the seemingly sound doctrine, known as "voluntary manslaughter" and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed "heat of passion," "sudden passion," "provocation," and the like (1 Warren on Homicide [Perm. Ed.] §85, pp. 416-417). The theory of the principle is one of extending a degree

> of mercy to a defendant who, though intending to kill, acted out of some kind of emotional disturbance rather than in cold blood.
>
> * * *

Subdivision 2, in conjunction with a provision of the revised murder statute (§125.25 [1a]), restores to New York the aforementioned common law doctrine of reduction from murder to manslaughter on the basis of "heat of passion." In the restoration process, however, the phrase "in the heat of passion" is abandoned as the criterion of mitigation in favor of the phrase, "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse" (§125.25 [1a]). The latter standard is adopted from the Model Penal Code of the American Law Institute (§210.3 [b]), and the reasons prompting this change are fully expounded in the Institute's commentaries (Model Penal Code Commentary, Tent Draft No. 9, pp. 28-29).

Moreover, as the Supreme Court pointed out in *Mullaney*, the "malice aforethought" specified in Maine's murder statute was not an element requiring objective proof but only a policy presumption of the absence of heat of passion (Id. at 694). While New York's statutes do not mention malice as such, they make the absence of extreme emotional distress an element of murder by distinguishing manslaughter from murder only by the presence of extreme emotional distress. Thus nothing turns on the fact that Maine gives this absence of the emotional factor a name and New York does not. Although not an element of the crime, said absence is the sole factor which determines whether the defendant will be convicted of murder or manslaughter and whether he will be subject to a maximum sentence of life or 25 years imprisonment. Functionally, the two statutory schemes are identical. The Supreme Court said of this design that it would permit a state to:

> undermine many of the interests that decision [*Winship*] sought to protect without effecting any substantive

> change in the law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. (421 US at 698.)

Under *Mullaney*, there is no alternative but to hold that the provision in subdivision 1 of section 125.25 of the Penal Law, which makes the contention that defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse an affirmative defense, with the burden of proof upon defendant to establish said defense by a preponderance of the evidence, unconstitutional as a violation of the due process provision of the Fourteenth Amendment. The record here, relating to defendant's mental state at the time of the killing, required a charge that to establish defendant's guilt of murder the prosecution had the burden of proving that defendant was not acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. In *United States ex rel. Castro* v *Regan* (525 F2d 1157, *supra*), it was stated at page 1160:

> No where did the court charge, as did the Maine court in *Mullaney*, that the defendant had the burden of "establish[ing] by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." * * * Rather, the court charged that, before the jury could find murder in the second degree, "there has to be proof beyond a reasonable doubt that there was the unlawful killing of another human being with malice and without reasonable provocation or justifiable cause or excuse."

Under such a charge, defendant had nothing to prove and the burden was kept where it belonged.

See: *People* v *Davis* (49 AD2d 437); *People* v *Woods* (84 Misc2d 301; *People* v *Balogun* (82 Misc2d 907). See also, *Evans* v *State* (28 Md App 640).

It is significant that, although the Appellate Division affirmed the judgment of conviction in this case before the Supreme Court handed down its decision in *Mullaney*, that same Appellate Division, creditably, changed its position in *People* v *Davis* (*supra*) when that case came to it after *Mullaney*.

The order of the Appellate Division should be reversed and a new trial granted.

* * * * * * * *

Order affirmed. Opinion by Jasen, J. Concur: Breitel, Ch. J., Gabrielli and Jones, JJ., Breitel, Ch. J., and Jones, J., in separate concurring opinions. Cooke, J., dissents and votes to reverse in an opinion in which Wachtler and Fuchsberg, JJ., concur.

Decided April 1, 1976

NEW YORK COURT OF APPEALS

The Remittitur of the New York Court of Appeals dated April 1, 1976, appears in Appendix B to the Jurisdictional Statement at B-1—B-3.

STEUBEN COUNTY COURT

The Order and Judgment of the Steuben County Court affirming appellant's conviction dated May 17, 1976 appears in Appendix B to the Jurisdictional Statement at B-4—B-6.

STEUBEN COUNTY COURT

The Notice of Appeal to the Supreme Court of the United States dated May 25, 1976 appears in Appendix C to the Jurisdictional Statement at C-1—C-2.

In The

Supreme Court of the United States

October Term 1975

No. 75-1861

GORDON G. PATTERSON, JR.,
Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the
New York Court of Appeals

MOTION TO DISMISS OR AFFIRM

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—

BRIEF FOR APPELLEE

—

MOTION

Appellee in the above-entitled case moves to dismiss or affirm the judgment of the New York Court of Appeals on the ground that the question presented is so insubstantial as not to need further argument.

QUESTION PRESENTED

Does the New York statute establishing as an affirmative defense to murder that the defendant acted under the influence of extreme emotional disturbance comport with due process?

STATUTES INVOLVED

N.Y. Penal Law §125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; . . .

N.Y. Penal Law §125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; . . .

N.Y. Penal Law §25.00 Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellant was convicted following a trial by jury of the crime of murder. The facts, as summarized in the court below, are as follows:

> The defendant, Gordon Patterson, and his wife, Roberta, had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults. As a result of one such incident, Roberta Patterson left her husband and instituted divorce proceedings. She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to the defendant. On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him. The defendant confessed to the killing and, after a hearing, the confession was held voluntary and was admitted into evidence against him at trial. Defendant's wife, an eyewitness to the crime, testified, over objection of defense counsel, that defendant fired

two shots at the victim from close range. The defense called eleven witnesses, including the defendant, who testified in great detail as to the defendant's life and particularly that period of his life when he was married to Roberta Patterson. The defense at the trial was that the crime, if there was one, was unintentional. This was based on defendant's version of events to the effect that the gun went off accidentally. Defendant also raised the affirmative defense that at the time of the alleged crime, he was acting under the influence of extreme emotional disturbance.

The court's charge to the jury was based on the homicide provisions of the Penal Law (§§125.25 [subd (1)(a)], 125.20 [subd (2)]). The jury was instructed that "[t]he mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond a reasonable doubt that the defendant acted intentionally." The People were required to establish beyond a reasonable doubt that the defendant "intended, in firing the gun, to kill either the victim himself or some other human being." To find intent, the jury had to conclude that the defendant had the "conscious objective to cause death and that his act or acts resulted from that conscious objective." The jury was cautioned that they "must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

With respect to the defense of extreme emotional disturbance, the court stated that the point of this evidence was to convince the jury, by a preponderance of the evidence, that "the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." The court did not elaborate on the definition of "extreme emotional disturbance", noting that the words are "self-evident in meaning". However, the court cautioned that "'extreme' precludes mere annoyance or unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it." As to the burden of proof, the court repeated its earlier instruction that "generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse."

Finally, the court instructed the jury that "[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree * * * *". The Court went on to explain that "[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and

remains a homicide, but is punishable in less severe manner than murder." No objection was taken to the above quoted portions of the court's charge.

The jury found the defendant guilty of murder. The Appellate Division unanimously affirmed the judgment of conviction.

* * *

In May 1973, when the Appellate Division affirmed the judgment of conviction, there was no intimation that the homicide provisions might be vulnerable to serious constitutional challenge. In fact, the initial brief filed by appellant in our court did not raise a due process argument. The point was raised for the first time in a supplemental brief prepared after *Mullaney* was handed down. (A1-5)*

The New York Court of Appeals agreed to consider the issue of the constitutionality of the affirmative defense of extreme emotional disturbance even though the defendant had failed to object to the trial court's charge on this point, "[s]ince the error complained of goes to the essential validity of the proceedings conducted below . . . ." (A8). The Court also decided that *Mullaney* should be given retroactive effect enabling the defendant to assert his claim, although his conviction predates the *Mullaney* decision.

In a four-to-three decision, the Court of Appeals upheld the constitutionality of the statute, the majority concluding that "the New York law of homicide differs significantly from the Maine law struck down in *Mullaney*" (A8-9). In separate concurring opinions, Chief Judge Breitel pointed out "the salutary criminological purposes served by the development of

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*Numerical references preceded by "A" are to the Appendix to Appellant's brief.
Numerical references preceded by "RA" are to the Record on Appeal.

affirmative defenses, . . ." and Associate Judge Jones concluded that since "[o]ur Legislature has carefully and thoughtfully revised our State's Penal Law" and "the intelligent use of affirmative defenses makes eminently sound sense in the criminal law today," the statute should not be declared unconstitutional in the absence of more explicit authority than the *Mullaney* decision (A19, A22). The dissenters concluded that "[u]nder *Mullaney*, there is no alternative but to hold [the affirmative defense of extreme emotional disturbance statute] unconstitutional as a violation of the due process provision of the Fourteenth Amendment."

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. The Decision By The New York Court Of Appeals In *People* v. *Patterson*, Upholding The Constitutionality Of The Affirmative Defense To Murder Of Extreme Emotional Disturbance, Was Rendered In Accordance With This Court's Decisions In *Mullaney* v. *Wilbur*, *In Re Winship* And *Leland* v. *Oregon* And Presents No Substantial Federal Question.

1. The Basis Of The Decision Below Was Construction Of A State Statute.

The decision by the New York Court of Appeals in the instant case involved the construction of a state statute whose constitutionality was challenged on the basis of this Court's decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). The court below examined the *Mullaney* decision in detail before arriving at its determination that, consistent with *Mullaney*, New York's affirmative defense to murder of extreme emotional disturbance does not violate due process. The Court of Appeals decision was consistent with its prior decision in *People* v. *Laietta*, 30 N.Y.2d 68 (1972), *cert. denied*, 407 U.S. 923 (1972), upholding the

constitutionality of New York's affirmative defense of entrapment.

It is well settled that if the sole basis for a state court's decision is one of statutory construction, "the case cannot be the subject of either appeal or certiorari." Stern and Gressman, *Supreme Court Practice*, pp. 86-87 (4th ed. 1969). It is equally well settled, as noted by this Court in the *Mullaney* decision *supra* at 691, "that state courts are the ultimate expositors of state law . . . and that we are bound by their construction except in extreme circumstances. . . ." See *Winters* v. *New York*, 333 U.S. 507 (1948) and *Murdock* v. *City of Memphis*, 20 U.S. 590 (1875). In the instant case, the construction given New York's affirmative defense statute by the Court of Appeals necessarily supports its constitutionality, inasmuch as the statute does not place any burden upon a defendant to disprove an element of the crime of murder but rather merely requires that a defendant prove a mitigating circumstance in explanation of an element, to warrant conviction for a lesser crime than the People's proof would otherwise call for.

2. The Respective Statutes Of Maine And New York Are Materially Different.

New York "has always defined murder and manslaughter as separate and distinct offenses with punishments varying to fit the degree of the crime." (A11). Maine, however, has defined one generic category of felonious homicide allowing mitigation only in the form of punishment. See *Mullaney supra* at 690-91. Under the Maine statute, the facts of intent are relevant only to punishment, whereas in New York, *intent is an element of the crime of homicide which must be proved by the prosecution beyond a reasonable doubt.* (A16), *Mullaney supra* at 690-91). New York, unlike Maine, does not imply malice from the act of killing but instead requires the prosecution to prove that the defendant intended to effect death (A12). Moreover the New York affirmative defense of extreme emotional disturbance does

not require, as does the Maine defense of heat of passion on sudden provocation, that the defendant have reached a point of "hot blood." Under the New York statute, "it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore." (A16-17).

3. The Respective Jury Instructions In *Mullaney* v. *Wilbur* And *Patterson* v. *New York* Are Materially Different.

The fundamental differences between the Maine and New York statutes are most dramatically illustrated by the differing instructions in the *Mullaney* and *Patterson* cases. In *Mullaney*, the trial court charged the jury that (a) malice aforethought was an essential and indispensable element of the crime of murder without which the homicide would be manslaughter; (b) malice aforethought was to be conclusively implied from an intentional and unlawful homicide unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation; and, (c) malice aforethought and heat of passion were two inconsistent things and by proving the latter the defendant would negate the former. See *Mullaney supra* at 686-87. In the instant case, the trial court charged the jury that (a) murder is an intent crime and the prosecution must prove beyond a reasonable doubt that the defendant intended to kill the victim or some other human being; (b) to find intent, the jury had to find that the defendant had the conscious objective to cause death and that his acts resulted from that conscious objective; (c) whatever proof the defendant may have offered to convince the jury of his innocence, he was not obliged to prove anything; and, (d) the burden was on the defendant to establish, by a preponderance of the evidence, that his "apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." (A50-51, 55-56).

These differing jury instructions demonstrate the crucial distinction between the Maine statute invalidated in *Mullaney* and the New York statute subsequently upheld in *Patterson*. In New York the burden of proof is at all times on the prosecution to prove the element of intent, whereas the Maine statute required the defendant to disprove this crucial element of the crime.

4. The Instant Case, Unlike *Mullaney* v. *Wilbur*, Presents No Conflicting Opinions On The Constitutionality Of New York's Statute.

The *Mullaney* case came before the Court with conflicting interpretations of the Maine statute and conflicting rulings on its constitutionality by the United States Court of Appeals for the First Circuit and the Supreme Judicial Court of Maine. See *Wilbur* v. *Mullaney*, 473 F.2d 943 (1st Cir. 1973) and *State* v. *Lafferty*, 309 A.2d 647 (1973). In the instant case, no such conflict between courts of equal jurisdiction exists. Indeed, the constitutionality of another of New York's affirmative defenses has recently been sustained by the United States Court of Appeals for the Second Circuit.

In *Robinson* v. *Warden*, F. Supp. (E.D.N.Y. March 10, 1976), *aff'd*, F.2d (2d Cir. June 10, 1976), the constitutionality of New York Penal Law section 125.25(3), the affirmative defense to felony murder, was challenged pursuant to the *Mullaney* decision as violative of due process. The court found that under that subsection, which adjoins the subsection challenged by the defendant in the instant case, "[t]he prosecutor is not relieved of proving any essential element of the crime of felony murder . . . ." Slip opinion, page 7. The Court rejected the argument "that the mere requirement under the statute that a defendant assert an affirmative defense is violative of the due process clause." *Id.*

The decision in *Robinson* is entirely consistent with the decision in the court below. Both the New York Court of Appeals and the United States Court of Appeals for the Second Circuit agree that the affirmative defenses in New York's Penal Law are distinguishable from the Maine statute declared void in *Mullaney* and are consistent with the due process principles enunciated by this Court in the *Mullaney* decision.

5. The Decision Below Is Fundamentally Consistent With Principles Of Due Process Enunciated By This Court And Post-*Mullaney* Decisions In Other Jurisdictions.

Against this factual and historical background, it is evident that the *Patterson* decision does not conflict with the decision in *Mullaney* v. *Wilbur* and presents no substantial federal question. "[T]he gist of *Mullaney* v. *Wilbur* [is] that the state prove all elements of an offense beyond a reasonable doubt . . . ." *Wilkins* v. *Maryland*, 402 F. Supp. 76, 80 (D.C. Md. 1975). Read together, *Mullaney*, *In re Winship*, 397 U.S. 357 (1970), and *Leland* v. *Oregon*, 343 U.S. 790 (1952) require that an accused may be convicted of a crime only upon proof by the prosecution that the defendant is guilty beyond a reasonable doubt of every element of the crime charged.

These decisions do not and cannot stand for the proposition that the defendant shall never have the burden of proof to establish some mitigating circumstance, in *explanation* of an element, to warrant a conviction for a lesser offense if the defendant be guilty of any crime. As Mr. Justice Cardozo wrote for a unanimous bench in *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934):

> [W]ithin limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at

> least upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Requiring a defendant to prove by a preponderance of the evidence, that he acted under an extreme emotional disturbance in mitigation of murder, after the prosecution has proved beyond a reasonable doubt all of the elements of murder including intent, places no undue or unjust burden upon the defense. Similar "burdens" have been upheld against due process attacks brought after the *Mullaney* decision.

In *United States ex rel. Castro* v. *Regan*, 525 F.2d 1157 (3d Cir. 1975), the court denied habeas corpus relief to the petitioner who claimed he had been denied due process in his murder prosecution by a jury instruction that, "The law presumes that all unlawful homicides, that is all unlawful killings, are committed with malice unless the lack of malice is affirmatively demonstrated by the evidence." The Third Circuit distinguished *Mullaney* on the ground that malice was an element of intent, which in New Jersey, unlike in Maine, had to be proven beyond a reasonable doubt by the prosecution and could not be presumed absent proof to the contrary. This Court recently declined to hear an appeal from that decision. U.S. , 19 CrL 4067 (1976).

In *James* v. *United States*, D.C., 350 A.2d 748 (1976), the District of Columbia Court of Appeals upheld the constitutionality of a statute which placed the burden of proof upon the defendant to show innocent possession of the implements of a crime. The court emphasized in its decision that "[t]he burden of proof beyond a reasonable doubt of every element of the crime was still on the prosecution." *Id.* at 750. Several jurisdictions have been called upon since *Mullaney* to reconsider the constitutionality of the affirmative defense of insanity. At least three such jurisdictions have reaffirmed the constitutionality of these

statutes. See *Grace* v. *Hopper*, 234 Ga. 669, 217 S.E.2d 267 (1975); *State* v. *Berry*, La., 324 So. 2d 822 (1975); *State* v. *Melvin*, Me., 341 A.2d 376 (1975). The court in *Melvin supra* at 379, fn. 6, could "not find that the rationale of [*Mullaney*] demands the abandonment of our long established rule as to burden of proof of mental disease or defect." Inasmuch as "[t]he purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity . . ." (A16), and this affirmative defense is only a mitigating circumstance and not exculpatory, as is the defense of insanity, this New York statute should pass constitutional muster as readily, if not more so, than the statutes upheld in the above-cited cases and in *Leland* v. *Oregon* by this Court.

6. New York's Affirmative Defense Statutes, Including The One In Controversy, Constitute A Progressive Development In The Criminal Law.

New York's affirmative defense statutes, which pervade the State's Penal Law, represent an evolution of the criminal law that is fundamentally consistent with the due process requirements of the Constitution. As Chief Judge Breitel noted in his concurring opinion below:

> In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser and greater degree. In times when there is also a retrogressive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.
>
> * * *
>
> [T]he appropriate use of affirmative defenses enlarges the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around

> — a shift from primitive mechanical classifications based on the bare anti-social act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, the mark of an advanced criminology (A19-21).

It is respectfully submitted that New York's statutory scheme, which permits juries to adjust offenses of lesser and greater degree by allowing defendants to prove mitigating circumstances, readily satisfies due process and is to be distinguished from the antiquated Maine statute invalidated in *Mullaney*, which embodied the archaic concept of malice aforethought as an element of the crime of murder and placed the burden upon the defendant to disprove it.

B. The Instant Case Presents No Controversy As To The Retroactive Application Of The *Mullaney* Decision.

Inasmuch as the defendant's conviction pre-dated the *Mullaney* decision, retroactive application of that decision is required before he may derive any benefit therefrom. Although this Court has not yet determined to apply *Mullaney* retroactively, the New York Court of Appeals interpreted the *Mullaney* decision so as to require retroactive application (A8). Since, however, the court ultimately determined that New York's affirmative defense of extreme emotional disturbance does not violate due process, the retroactivity issue is moot in this appeal.

Should this Court wish to reach this issue, appellee urges that the *Mullaney* decision not be given retroactive application. Two states have, in fact, declined to extend retroactive application of *Mullaney* in decisions that invalidated their respective affirmative defense statutes. See *Fuentes* v. *State*, Del., 349 A.2d 1 (1975) and *State* v. *Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975). Ironically, these decisions which would be of no avail to this defendant had he been directly affected by them, are cited in support of his position.

In *Hankerson*, *supra* at 591, the court warned:

> Retroactive application of *Mullaney* requiring retrials in homicide cases years old in at least fifteen jurisdictions would, we believe, have on the administration of justice in this country a devastating impact.

CONCLUSION

Wherefore, Appellee Respectfully Submits That The Questions Upon Which This Cause Depend Are So Insubstantial As Not To Need Further Argument, And Appellee Respectfully Moves The Court To Dismiss This Appeal Or, In The Alternative, To Affirm The Judgment Entered In The Cause By The Court Of Appeals Of New York.

Dated: Bath, New York
July, 1976

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1975

No. 75-1861

GORDON G. PATTERSON, JR.,
Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the
New York Court of Appeals

REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellee in the above-entitled appeal has moved to dismiss or affirm the judgment of the New York Court of Appeals. This reply brief is submitted in opposition to this motion.

THIS APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION AND PLENARY REVIEW SHOULD BE GRANTED

A. In shifting the burden of persuasion to the defendant the New York affirmative defense in question is in direct conflict with *Mullaney* and is in conflict with seven other states which have adopted the Model Penal Code defense of extreme emotional disturbance.

Appellee argues that the New York affirmative defense of "extreme emotional disturbance" constitutes a progressive development in the criminal law (Point A(6) of Appellee's Motion).

While the substance of the defense which constitutes a liberalization of the heat of passion defense may be progressive, this does not justify New York in shifting the burden of persuasion to the defendant in violation of *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970).

Moreover, at least seven other jurisdictions have adopted the Model Penal Code defense of "extreme emotional disturbance" and they have chosen not to shift the burden to the defendant. Hawaii Penal Code Secs. 702, 115 (1974); Kentucky Rev. Stat. Secs. 507.020, 507,030, 500.070 (1975); Rev. Codes of Montana Secs. 94-5-101, 94-5-102, 94-5-103 (1975); N. Dakota Century Code Secs. 12.1-16-02(2), 12.1-01-03(3) (1975); Page's Ohio Rev. Code Secs. 2903.02, 2903.03 (1975); Oregon Rev. Stat. Secs. 163.115(1)(a), 163.055(2) (1975); Utah Code Ann. Secs. 76-5-203, 76-5-205, 76-1-501 (1975).

The Model Penal Code itself does not provide for shifting the burden of persuasion, nor did the original proposed version of the defense in New York contain such a provision. *People v. Patterson*, 39 N.Y.2d 288, 301. This Court should grant plenary review to insure compliance with *Mullaney* and to

insure uniformity among the states in placing the burden of persuasion on the issue of "extreme emotional disturbance" in murder trials.*

B. A decision on this appeal by this court will resolve doubts in other jurisdictions about the applicability of *Winship* and *Mullaney* to affirmative defenses generally.

Subsequent to the *Mullaney* decision, several state courts, including the court below, have expressed uncertainty about the applicability of *Mullaney* to affirmative defenses generally. See *Commonwealth v. Moyer*, 353 A.2d 447, 449, Pa. (1976) and the reference therein to *Commonwealth v. Rose*, 321 A.2d 880, Pa. (1974); *People v. Tewksbury*, 544 P.2d 1335, 1343, Supr. Calif. (1976); see also *People v. Patterson, supra.*, (Breitel, C.J. concurring opinion).

In the federal courts, the affirmative defense to felony-murder in New York (unrelated to the defense of "extreme emotional disturbance") has been upheld against an "indirect challenge" to its constitutionality. *Robinson v. Warden*, not officially reported, (E.D.N.Y. March 10, 1976, Mishler, J.); aff'd F.2d (2d Cir. June 10, 1976).** The *Robinson* decision (decided prior to *Patterson*) further heightens the need for a

---

*In fact, there is not even uniformity in New York on this issue as ". . . it is the policy of the District Attorney for New York County to treat this as an ordinary defense and he has requested the court to place the burden on the People to disprove it beyond a reasonable doubt." *People v. Shelton*, Supreme Court, New York County, N.Y.L.J. 7.1.76, p. 9 col. 3.

** This affirmance was based on the district court opinion below and the Court of Appeals perception that defendant's failure to make proper objection at trial was a calculated maneuver.

definitive statement by this Court concerning affirmative defenses.*

In addition, *Evans v. State*, 349 A.2d 300, (1975) invalidating the Maryland rule shifting to the defendant the burden of proving provocation has been unanimously affirmed by the Court of Appeals of Maryland, A.2d (July 15, 1976 No. 173).

In sum, the court below and other courts are having difficulty in applying *Mullaney* and plenary review should be granted to resolve these difficulties.

C. Appellant does not challenge New York's interpretation of its murder statute.

Appellee argues that this appeal should be dismissed since the sole basis of the New York Court of Appeals decision is one of statutory construction (Point A(1) of Appellee's Motion). Appellant agrees that the New York Court of Appeals construction of the New York murder statute is binding on this Court. However, appellant argues that there exists constitutional error in not applying *Mullaney v. Wilbur*, to strike down the New York affirmative defense of "extreme emotional disturbance" as construed by the New York Court of Appeals.

*Appellee's reliance on *United States ex rel Castro v. Regan*, 525 F.2d 1157 (3rd Cir. 1975) is misplaced since it is clear that under New Jersey law there is no shifting of any burden of persuasion to the defendant in a murder prosecution. See *State v. Robinson*, 354 A.2d 374, 380, 139 N.J. Super. 475 (1976).

D. The insanity defense is not in issue on this appeal.

Appellee also cites cases upholding the requirement that the defendant bear the burden of proving insanity in support of the proposition that *Patterson* is consistent with other jurisdictions in applying *Mullaney* (Point A(5) of Appellee's Motion). Appellant in his Jurisdictional Statement has previously shown that the insanity defense is clearly a distinct defense in New York, and, most importantly, the People in New York have the burden of persuasion. New York Penal Law, §§25.00, 30.05, Compare *Fuentes v. State*, 349 A.2d 1 Del. (1975) (invalidating the affirmative defense of "extreme emotional distress") with *Rivera v. State*, 351 A.2d 561 Del. (1976) (upholding the affirmative defense of mental illness).* This Court has recognized such a distinction. *Leland v. Oregon*, 343 U.S. 790 (1952); *Mullaney v. Wilbur, supra.*, Rehnquist (conc.). But see *Buzynski v. Oliver*, 45 U.S.L.W. 2062 C.A. 1, July 14, 1976.

In sum, the burden of proving insanity is not an issue in this case.

*The attempt to link the insanity defense with the modern version of the heat of passion defense has grave pitfalls. Consider the inquiry of Justice Kassal in *People v. Shelton, supra.*, at page 9 col 1:

> "In order to arrive at a definition of 'extreme emotional disturbance' to apply to defendant's actions in this case, I asked both forensic psychiatrists to state their understanding of the term. (Both are very experienced witnesses who have given expert testimony in hundreds of cases.)
>
> "They agreed that this term is a creature of law and has no diagnostic classification in the Diagnostic and Statistical Manual of the American Psychiatric Association."

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: Ithaca, New York
August, 1976

Respectfully submitted,

Betty D. Friedlander

Victor J. Rubino

Attorneys for Appellant.

In The

Supreme Court of the United States

October Term 1976

No. 75-1861

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PEOPLE OF THE STATE OF NEW YORK,
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BRIEF FOR THE APPELLANT

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—

OPINION BELOW

The opinion of the New York Court of Appeals was rendered on April 1, 1976. *People v. Patterson*, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976). The opinion appears in the Appendix filed with this Brief starting at page A. 96. No other opinions were rendered by the lower courts.

JURISDICTION

The judgment of the New York Court of Appeals was filed and entered April 1, 1976 (Appendix B-1 to Jurisdictional Statement). A Notice of Appeal to this Court was filed on May 26, 1976 in the Steuben County Court, the Court possessed of the record (Appendix C to Jurisdictional Statement). The Jurisdictional Statement was filed on June 24, 1976; probable jurisdiction was noted by this Court on October 4, 1976.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(2) (1970).

STATUTES INVOLVED

United States Constitution, Amendment XIV

"... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

In pertinent part, the New York Penal Law states:

N.Y. Penal Law §125.25 (McKinney 1975) Murder in the second degree*

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

*In 1974, the Legislature added a new crime, murder in the first degree. N.Y. Penal Law, §125.27 (McKinney 1975). This statute comes into operation where the victim of the murder is a police officer, an officer in a correctional facility or where the defendant was incarcerated for a life sentence. A convicted defendant is to be sentenced to death. N.Y. Penal Law, §60.06 (McKinney 1975). As part of this enactment, section 125.25, which formerly defined the degreeless crime of murder, was retitled, without a change in substance, murder in the second degree. (L. 1974, ch 367, §4.)

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime;

* * *

Murder in the second degree is a class A-I felony.

N.Y. Penal Law §125.20 (McKinney 1975) Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

* * *

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

* * *

Manslaughter in the first degree is a class B felony.

N.Y. Penal Law §25.00 (McKinney 1975). Defenses; burden of proof

* * *

2. When a defense declared by statute to be an "affirmative defense" is raised at trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

QUESTION PRESENTED

Whether the statutory provisions of the New York Penal Law, which placed the burden on Appellant at his trial for murder to prove that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter, on their face and as applied to Appellant, violate the Appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution as construed by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In Re Winship*, 397 U.S. 358 (1970).

STATEMENT OF THE CASE

This appeal arises from Appellant's conviction for murder. The uncontroverted facts are as follows:

Appellant, Gordon Patterson, and his wife, Roberta Rooks, had a highly unstable courtship and subsequent marital relationship, marked by recurring verbal arguments and physical assaults (R.* 561-64), highlighted by five break-ups during the engagement and four more break-ups during the marriage (A.** 55).

Roberta Rooks was six months pregnant when she married Appellant. Although neither Appellant nor the decedent, John

*R refers to pages in the transcript of the original Record on Appeal.

**A refers to Pages in the separately bound Appendix filed with the Brief in this Court.

Northrup, was the father (A. 55), the child was given the surname - Patterson (A. 55; R. 560, 892). After seven months of marriage, Appellant's wife left him permanently on August 5, 1970. She later commenced divorce proceedings against Appellant (A. 55; R. 574-82).

After her separation from Appellant, Roberta resumed dating the decedent, John Northrup, a neighbor to whom she had been engaged prior to her marriage to Appellant (R. 442, 584). Between the final breakup in August, 1970 until the fatal shooting of John Northrup by the Appellant on December 27, 1970, the Appellant made strenuous efforts, mostly through a litany of telephone calls, sometimes ten each night, to Roberta and her relatives, to try to reunite with Roberta. Roberta talked with him on some occasions and other times hung up (A. 56). These efforts and calls reached a crescendo on the evening of December 26, 1970 and early morning of December 27, 1970. (A. 55, 58, 60; R. 321, 470, 471, 474, 475, 806, 807, 808).

On December 10, 1970, the Appellant went to his in-laws' residence and found his wife in a compromising situation with John Northrup and struck him (R. 589, 590, 598). On December 15, 1970, Appellant called the Veteran's Administration in Bath, New York to request a neuropsychiatric examination (A. 59; R. 861, 864). On Christmas Eve, Appellant's wife and the child met at Appellant's mother's home where Appellant gave Roberta many gifts, including a ring and a yellow skirt. Roberta gave Appellant a watch (R. 469, 480).

On December 27, 1970 the Appellant attended a church service at which the subject of the sermon was adultery and which contained the following thought:

> "You can only pent up true feelings just so long, then you have to burst, something has to break." (R. 828)

Later that day, Appellant drove to the home of a friend, Murray Collins, to ask advice on the mechanical condition of his

car. After a discussion with Collins, he made arrangements to have his car repaired the next day. Collins agreed to lend Appellant a car for his use while repairs were being made. Appellant also asked Collins to lend him a .22 caliber rifle which was lying on a table. Appellant claimed he wanted to use the rifle for target practice (R. 361-62, 365-67). Collins testified he volunteered to furnish an undetermined amount of ammunition which Appellant had not requested. Collins stated he did not consider the request for the loan of the rifle to be an unusual one since Appellant had borrowed guns from him on previous occasions (R. 389-391).

Appellant, taking the borrowed rifle, drove by his father-in-law's residence and saw John Northrup's car there. He parked the auto he was driving, and with the rifle in hand, went to the Rook's house. He looked in through a door and window and saw John Northrup, the baby and his wife Roberta. Roberta was dressed in only a blouse and slip and was trying on the yellow skirt Appellant gave her only two nights before (R. 480). Thereupon he entered the house and shot Northrup twice in the head, killing him. (A. 60; R. 480, 510).

Appellant called as a witness, Dr. William Libertson, a psychiatrist, who when presented with a hypothetical question which summarized the facts, stated his opinion that Appellant at the time of the shooting was under the influence of extreme emotional disturbance, his perceptions were warped, his acts irrational and his ability to control himself defective (A. 24, 25).

At the request of the prosecution, Appellant was examined before the trial by another psychiatrist, Dr. Martin Lubin of New York City. The District Attorney, however, did not call Dr. Lubin to testify and he conceded that Dr. Lubin's testimony would have supported the conclusions of Appellant's psychiatric witness, Dr. Libertson (A. 62; R. 1129).

The facts of the marital relationship between Appellant and Roberta and the physical facts of the killing were not in disupte at the trial. As the trial court stated in its charge to the jury:

> "What actually happened here is clear, although there are some minor discrepancies between the stories told from the witness stand." (A. 73); *see also, People v. Patterson*, 39 N.Y.2d 288, 291-92, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976); (A. 96, 97).

At the trial, Appellant raised the affirmative defense that at the time of the alleged crime he was "acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. . . ." According to the New York statutory scheme, Appellant had the burden to prove this defense by a preponderance of the evidence in order to reduce murder to manslaughter. N.Y. Penal Law §§25.00; 125.20; 125.25 (1) (a) (McKinney 1975). The jury was charged in conformity with these statutes.

In part the judge stated to the jury:

> This is what we call, and what the law has designated as, an affirmative defense. That means that if you believe that the defendant acted under extreme emotional disturbance, and that there was reasonable explanation for its existence at that time and place and under those circumstances, you cannot find him guilty of murder. You may, of course, on further examination of the evidence, decide that there was manslaughter in the first degree, as I shall instruct you, but you cannot find murder if, indeed, you believe this. (A. 74)
>
> * * *
>
> In this connection, there is one other consideration. I have already instructed you that, generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the

burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you both that he was so emotionally influenced, and that it is reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence. (A. 74, 75)

* * *

As to the preponderance of the evidence it is the quality of the testimony and not its quantity which guides you in your deliberations. By a preponderance of the evidence we do not mean the greater number of witnesses, we mean the greater weight of the believable (credible) testimony and evidence which has been brought here during the course of this trial as to the defense of extreme emotional disturbance.

You might consider in determining this, if you will, an imaginary scale, and after you have sifted out the evidence, place the believable and credible evidence in favor of the defendant as to the issue of this defense of extreme emotional disturbance on the one side of the scale and the believable and credible evidence in favor of the prosecution on that particular issue on the other side of the scale. And if in your judgment and your judgment alone, the scale tips in favor of the defendant, then he has sustained his burden of proof as to the defense of extreme emotional disturbance. On the other hand, if the scale is evenly balanced, then the defendant has failed to establish his burden of proof as to that particular fact. (A. 76)

The charge of the court is set forth in its entirety in the Appendix. (A. 46-95; see especially A. 73-80). The jury deliberations took roughly fifteen hours over a period of two days (A. 82, 85, 86, 87). The jury made four requests for clarification of the charge. These requests were for a reading of

the portion of the charge pertaining to the definitions of the two crimes charged — Murder and Manslaughter, in the First Degree (A. 83-84); a second reading of those same portions of the charge (A. 92); a copy of the defendants' psychiatrist's report (A. 83); and a copy of the defendant's testimony (A. 86-88).

The jury returned a verdict of guilty of murder and a judgment of conviction for murder was entered in the Steuben County Court on July 6, 1971. Defendant was sentenced to a term of 20 years to life imprisonment. The Supreme Court of the State of New York, Appellate Division, Fourth Department, unanimously affirmed the conviction without opinion, by a judgment and order dated, May 18, 1973. *People v. Patterson*, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (4th Dep't 1973).

On April 1, 1976, the Court of Appeals, by a 4-3 vote, affirmed Appellant's conviction for murder and upheld the constitutionality of the New York Penal Law provisions which required Appellant to prove that he was acting under the influence of extreme emotional disturbance in order to reduce murder to manslaughter. The majority opinion held that "the law of this State does not infringe the due process interests that *Mullaney* sought to protect" (A. 104). The New York Court of Appeals concluded that *Mullaney* is not applicable because, unlike Maine, the New York affirmative defense in question "does not negate intent" which "the prosecution is at all times required to prove . . ." (A. 111). The New York Court concluded further that *Mullaney* was distinguishable on the grounds that "the opportunity opened for mitigation differs significantly from the traditional heat of passion defense" (A. 111). Yet, noting that the three dissenters formed a contrary interpretation of *Mullaney*, the Court stated: "To be sure, the issue is not free from doubt" (A. 112).

Even greater doubt was expressed by one of the 4-3 majority, Judge Jones, who in a separate concurring opinion stated:

> "Thus, I am not prepared ... to strike down the provision here under review because on one analysis the opinion of the United States Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684, would appear to call for that result. Another reading of the same opinion leads *others* to a different conclusion. In that circumstance, I conclude that, until there has been an explicit determination by the Supreme Court which permits us no alternative, it serves better in this case to leave to the Court the articulation of its views ..." (Emphasis added). (A. 117)

The separate concurring opinion of Chief Judge Charles Breitel, favorably referred to in the majority opinion (A. 113), reveals a basic disagreement with this Court's decision in *Mullaney*. He states:

> "The placing of the burden of proof on the defense with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the "element" of mitigating circumstances is generally unfair." (A. 115)

Chief Judge Breitel further argued that requiring the prosecution to bear the burden of proof on ameliorative defenses might discourage their use.

The three dissenters would have voted to reverse Defendant's conviction on the basis that *Mullaney* was "determinative" of his due process claim (A. 121).

Significantly, the majority opinion specifically found that "the People did not controvert the testimony of the defense psychiatrist ..." (A. 113).

SUMMARY OF ARGUMENT

Appellant challenges his murder conviction on the grounds that the requirement of the New York Penal Law that he must bear the burden of persuasion by a preponderance of the evidence of the affirmative defense to murder, that he was acting

under the influence of extreme emotional disturbance in order to reduce murder to manslaughter is in direct conflict with this Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970).

Appellant's overall contention is that there is a total functional identity between the extreme emotional disturbance defense of New York and its common law forebear, the heat of passion defense reviewed in *Mullaney*. Both defenses mitigate the crime rather than exonerate the defendant. Both defenses have specific reference only to the laws of homicide. Both distinguish murder from manslaughter. Both operate on the same premise that intentional killing resulting from loss of control is less culpable than killing in cold blood. Both place the burden of persuasion on the defendant and require the same quantum of proof by the defendant (i.e. preponderance of the evidence).

Moreover, the three *Winship* factors analyzed by this Court as critical in *Mullaney* are clearly present in the challenged New York affirmative defense. The first factor, community confidence in reliability of verdicts is even more crucial now because under recent cases decided by this Court, murder is a crime for which the death penalty can be imposed. As for the second *Winship* factor, the New York Court of Appeals decision below conceded that the punishment differentials between murder and manslaughter are significant. Third, the stigma attached to murder as opposed to manslaughter can be no less in New York than in Maine or any other state.

The *Patterson* majority argued that New York law is distinguishable since in Maine* a defendant had to negative the element of intent. Appellant responds that this is a misreading of *Mullaney* and clearly not the law in Maine. The presumption of

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*Reference to Maine law is at the time of the *Mullaney* decision. Maine has now adopted the extreme emotional disturbance defense and the persuasion burden is on the prosecution. Maine Rev. Stat. 17-A, §204 (Supp. 1976).

"malice aforethought" in Maine was a policy presumption only, not a fact to be proved and was thus only a way of expressing the absence of heat of passion. Therefore, Appellant contends that the application of *Mullaney* should not turn on the fact that Maine had a phrase — "malice aforethought" — to describe the absence of heat of passion, while New York has no particular name to describe the absence of extreme emotional disturbance. In both states an intentional and unjustified killing is proof of murder, without more. In both states, proof of the mitigation defense reduces murder to manslaughter. In substance (if not in form) both affirmative defenses function identically.

The *Patterson* majority singled out the fact that the extreme emotional disturbance defense is more liberal than its forebear, the heat of passion defense, but the majority opinion does not develop what relevance this has in terms of *Winship* and *Mullaney*. In a separate concurring opinion, Chief Judge Breitel articulated reasons why affirmative defenses should not, as a general matter, be restricted in their formulation and application by judicial limitations.

Chief Judge Breitel noted that affirmative defenses serve a laudable purpose in the criminal law. If the burden of persuasion must remain on the prosecution with affirmative defenses, Chief Judge Breitel argued that there may be legislative retaliation eliminating such defenses altogether. Appellant responds that a laudable purpose per se, does not justify shifting the burden. *Winship, supra*. Also, the purpose of avoiding legislative retaliation affords no recognized basis in law for not applying constitutional due process standards. With regard to the potential for legislative retaliation, Appellant points out that most states that have adopted the extreme emotional disturbance defense do not shift the burden to a defendant. Furthermore, New York bases its extreme emotional disturbance defense on the ALI Model Penal Code formulation and that Code specifically does not make extreme emotional disturbance an affirmative defense.

An implicit corollary to the above argument is that since a state can eliminate a defense altogether, it should certainly be allowed to shift the burden. This rule is sometimes referred to as "the greater includes the lesser" rule and Appellant contends this rule has been severely limited by this Court in *Tot v. United States*, 319 U.S. 463 (1943) and *Leary v. United States*, 395 U.S. 6 (1969). To paraphrase what this Court stated in *Mullaney:* if a state chooses to make a defense the distinguishing factor between murder and manslaughter it bears the burden of proving it. *Mullaney v. Wilbur, supra*, at 697, 698.

Chief Judge Breitel also advanced the "hardship of proof" argument that mitigating circumstances are within the defendant's knowledge, it is fair for him to prove them and unfair to require the prosecution to prove them. This "hardship of proof" argument was rejected in *Mullaney*. Furthermore, in New York, the prosecution has the burden of persuasion on both self-defense and more significantly, insanity. Thus, "hardship of proof" is not a consistent argument for New York to make. Appellant also demonstrates from the comments of the Model Penal Code, the legislative history of the emotional disturbance defense in New York and the plain meaning of the defense itself, that the extreme emotional disturbance defense is based ultimately upon an objective standard, (i.e. there must be a reasonable explanation or excuse) even though the sufficiency of the defense is judged from the viewpoint of a person in the defendant's situation. Finally as to hardship of proof, Appellant contends that nothing prevents a state from utilizing a "notice of defense" requirement or a pre-trial psychiatric examination of a defendant where the defendant intends to utilize a psychiatrist at trial.

Appellant also demonstrates that shifting the burden of proof to the defendant had crucial significance in this case in view of the fact that the prosecution psychiatrist agreed with the defense psychiatrist that Appellant was acting under the influence of

extreme emotional disturbance at the time of the killing. The jury's questions to the Court during their deliberations indicated their concern over the issue of the extreme emotional disturbance defense.

The Appellant in Point II distinguishes the insanity defense because of Appellee's contention in his Motion to Dismiss that *Patterson* is consistent with cases which uphold placing the burden of proving insanity on a defendant.

It must be stressed that the *Patterson* majority did not base any part of their decision on a claim that extreme emotional disturbance should be treated constitutionally in the same manner as the insanity defense. These defenses are legally distinct and in New York the prosecution has the burden on insanity. Second, the analysis of Justice Rehnquist in his concurring opinion in *Mullaney* applies to distinguish the extreme emotional disturbance defense of New York from insanity just as it did with the heat of passion defense of Maine. Unlike insanity, both extreme emotional disturbance and heat of passion do [redacted] bear a necessary relationship to the required mental elements of the crime (i.e. less culpable intent).

A third distinction from insanity is that extreme emotional disturbance is "ultimately objective" while insanity concerns itself with much more subjective and behavioral criteria. This distinction relates to the hardship of proof argument discussed in Point I of the Brief. Extreme emotional disturbance is objective because some tangible event or events must cause a defendant's loss of control to provide the reasonable explanation or excuse for his conduct whereas proof of insanity need show no cause nor explain anything other than the insanity status of the defendant without reference to tangible events or resonable excuses.

Fourth, Appellant demonstrates that this Court looked to state practice on placing the burden of insanity in *Leland v. Oregon*, 343 U.S. 790 (1952). This state practices factor cuts

the other way with extreme emotional disturbance however where New York is in the distinct minority on shifting the burden to the defendant on the defense of extreme emotional disturbance.

Finally, as to insanity, Appellant argues that the insanity defense is bound up with a presumption of sanity and that New York has specifically rejected a presumption analysis for the extreme emotional disturbance defense.

Lastly, Appellant argues that as the Court of Appeals found in *Patterson*, the decision in *Mullaney* should be applied retroactively since it is based on the decision in *Winship* which has been made fully retroactive by this Court.

In summary, this murder conviction should be reversed because the challenged New York statutory scheme is functionally identical to the rule declared unconstitutional by this Court in *Mullaney;* the extreme emotional disturbance defense of New York is historically grounded upon the heat of passion defense; and the analysis of *Winship* by this Court in *Mullaney* applies with equal force to the challenged defense.

POINT I

THE MAJORITY OPINION BELOW, UPHOLDING THE VALIDITY OF THE NEW YORK PENAL LAW REQUIREMENT THAT THE DEFENDANT IN A MURDER PROSECUTION MUST BEAR THE BURDEN OF PROVING THE AFFIRMATIVE DEFENSE THAT HE WAS "ACTING UNDER THE INFLUENCE OF EXTREME EMOTIONAL DISTURBANCE" IN ORDER TO REDUCE MURDER TO MANSLAUGHTER, IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *MULLANEY V. WILBUR* AND *IN RE WINSHIP*.

A. INTRODUCTION

1. *The New York Affirmative Defense Is Functionally Identical To The Defense Declared Unconstitutional in* Mullaney.

This Court has explicitly established that the Due Process Clause of the Fourteenth Amendment to the United States Constitution mandates the use of the reasonable doubt standard in criminal cases. *In re Winship*, 397 U.S. 358 (1970). It is further established that *Winship* requires the prosecution in a murder trial to bear the burden of persuasion beyond a reasonable doubt on proof of a fact which would reduce murder to manslaughter, even though such a "critical fact in dispute" is not considered by a state to be an element of the crime of murder. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). In *Mullaney*, this Court unanimously declared unconstitutional a State's requirement that a defendant in a murder trial bear the burden of proving by a preponderance of the evidence that the killing was done in the "heat of passion" in order to reduce murder to manslaughter.

The New York statutory scheme challenged here required the Appellant in his murder trial to bear the burden of proving by a preponderance of the evidence that he was "acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse" in order to reduce murder to manslaughter. On their face, the defense invalidated in *Mullaney* and the challenged New York defense are functionally identical. As in Maine,[1] the New York defense has particular reference only to homicide. As in Maine, the New York defense is one of mitigation, reducing murder to manslaughter rather than providing for total exoneration. As in Maine, the New York defense requires the defendant to bear the burden of persuasion by a preponderance of the evidence. This identity is not accidental as the extreme emotional disturbance defense is grounded upon the heat of passion defense. See Appendix B to this Brief.

2. *The Analysis of* Winship *By This Court In* Mullaney *Applies with Equal Force To The New York Affirmative Defense.*

When the New York affirmative defense of extreme emotional disturbance is subjected to the analysis of *Winship* engaged in by this Court in *Mullaney*, the result is identical. This Court looked to three factors cited in *Winship* for determining whether the reasonable doubt standard should apply in *Mullaney*, namely: (1) societal interest in the reliability of verdicts in criminal cases; (2) the significant punishment differentials between murder and manslaughter; and (3) the stigma attached to murder as opposed to manslaughter.

The intervening death penalty cases decided in this Court have highlighted the need for reliability in murder convictions and other heinous crimes. Since murder is one of the limited class of crimes to which many States, including New York have

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[1] All references to Maine law are to the homicide laws as they existed at the time *Mullaney* was decided. Maine has since adopted the "extreme emotional disturbance" defense, but the burden of persuasion is now on the prosecution. Maine Rev. Stat., 17-A, §204 (Supp. 1976).

made the death penalty applicable, it is a matter of supreme importance that a defendant guilty only of manslaughter not be convicted of murder and, thereby, be "eligible" for the death penalty.[2]

It is significant that extreme emotional disturbance is an affirmative defense in New York's death penalty statute, N.Y. Penal Law §125.72(2)(a) (McKinney 1975). Even without regard to the "eligibility" for death penalty consideration, there is no difference between New York and the rule invalidated in *Mullaney* insofar as reliability of verdicts is concerned.

As to punishment differentials between murder and manslaughter, New York has conceded that "the sentences that might be imposed for these crimes differ significantly." *People v. Patterson*, 39 N.Y.2d 288, 301, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976), *citing* New York Penal Law, §70.00[3] (A. 110).

With respect to the third factor, the stigma can be no different in New York than in Maine. *Mullaney v. Wilbur*, *supra* at 700.

Thus, not only are the relevant New York and Maine homicide laws functionally identical, but also, they have an

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[2]New York Penal Law §125.27; *Gregg v. Georgia*, 428 U.S. , 96 S.Ct. 2909 (1976); *Jurek v. Texas*, 428 U.S. , 96 S.Ct. 2950 (1976); *Proffitt v. Florida*, 428 U.S. , 96 S.Ct. 2960 (1976); *Woodson v. North Carolina*, 428 U.S. , 96 S.Ct. 2978 (1976); *Roberts v. Louisiana*, 428 U.S. , 96 S.Ct. 3001 (1976). It should be noted that in the penalty phase, mitigating circumstances (including provocation) must be taken into account, but are not to be weighed against factors of aggravation and thus are not necessarily controlling. See especially, *Jurek v. Texas*, *supra* at 2965, n. 7. where this Court recognized a distinction between proving provocation as a defense and having it considered in mitigation.

[3]The sentencing range for manslaughter in the first degree is from a minimum of one year to eight and one-third years to a maximum of three to twenty-five years. The sentencing range for murder in the second degree is from a minimum of fifteen to twenty-five years to a maximum of life imprisonment. N.Y. Penal Law §§125.25, 125.20, 70.00 (McKinney 1975).

analytical identity with the *Winship* factors considered controlling by this Court in *Mullaney*.

3. *The Majority Of States Do Not Shift The Persuasion Burden To The Defendant To Prove Facts Which Reduce Murder To Manslaughter.*

Concerning the heat of passion defense, this Court stated in *Mullaney*, "... the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact." 421 U.S. at 696. This trend has been continued in those states which have adopted the extreme emotional disturbance defense. Most of these States place the burden of persuasion upon the prosecution to prove this defense. See Appendix A to this Brief. This modern trend has significant bearing on what the due process standards may encompass. *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970); *In re Winship*, 397 U.S. 358, 361-62 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975).

Thus, the real issue on this appeal is whether there is anything qualitatively different about the challenged provisions of the New York Penal Law to take them out of the ambit of *Winship* and *Mullaney*. Appellant contends that none of the arguments put forth in the majority and concurring opinions below justify not applying *Winship* and *Mullaney* to the New York extreme emotional disturbance defense. Appellant further contends that if for due process purposes, a relevant distinction is made between extreme emotional disturbance and heat of passion, which are so closely related, the efficacy of *Mullaney* will be eroded.

B. THE OPINION BELOW

The basis for the decision of the 4-3 majority of the New York Court of Appeals was that the challenged New York law of homicide differed significantly from the Maine law of homicide declared unconstitutional by this Court in *Mullaney.*[4] The majority viewpoint breaks down into two parts. One part deals with the fact that the New York defense is more liberal to the defendant than the Maine Law.

According to the majority view, another reason the New York law differed from the Maine statute under review in *Mullaney* was that the challenged New York defense did not require a defendant to negative an element of the offense as defined by state law. The Court reasoned that because the New York statute required the prosecution to prove intent and extreme emotional disturbance does not negate but only explains or justifies that element of the crime, the burden of persuasion could fairly be placed on a defendant.

1. *A Formal "Elements Test" Was Rejected By This Court In* Mullaney, *Insofar As Mitigation Defenses To Murder Are Concerned.*

This Court in *Mullaney* specifically confronted and rejected the argument that Maine could place the persuasion burden on the defendant because heat of passion was not an element of the generic crime of homicide. In fact, the reason *Mullaney* was twice granted certiorari was to insure that the lower federal courts accepted the State's (i.e. Maine's) interpretation of its own law. *Mullaney, supra,* at 689. On reviewing *Mullaney* a second time, this Court clearly stated that Maine shifted the

[4]The three dissenting judges sharply challenged their conclusions (39 N.Y.2d at 307 *et seq,* A.117-127), and Judge Jones in his concurring opinion considered this issue to be tantamount to a toss-up (*Id.* at 307, A.117). Even the majority conceded that the issue was "not free from doubt" (*Id.* at 303, A.112).

burden to a defendant in a murder prosecution to prove heat of passion only after the State proved all the elements of murder including intent. *Mullaney, supra,* 691; *see State v. Rollins,* (ME.), 295 A.2d 914, 918 (1972).

The *Patterson* majority, however, placed great stress on the policy presumption in Maine law that malice aforethought was presumed from an intentional killing and that this "element" was what a defendant was required to negative by proof of heat of passion. *Patterson, supra,* 302; (A. 110-111).

The *Patterson* majority stated, 39 N.Y.2d at 302:

> "Under Maine law, malice and heat of passion are reflective of the defendant's intent, and the State could not constitutionally provide the prosecution with a presumption of malice and then require the defendant to negate it with proof that he acted under the heat of passion. (421 U.S., at 702)." *Patterson, supra,* 302; (A. 111).[5]

The *Patterson* majority view on malice aforethought accords with the view of the initial Federal District Court's opinion described in *Mullaney:*

> ". . . *Winship* requires the prosecution to prove malice aforethought beyond a reasonable doubt; it cannot rely on a presumption of implied malice, which requires the Defendant to prove that he acted in the heat of passion on sudden provocation." *Mullaney v. Wilbur, supra* at 688.

This Court, in *Mullaney* however, rejected the District Court analysis and made clear that its decision did not turn on treating

[5]Significantly, the *Patterson* majority cited *Mullaney,* 421 U.S. at 702, to bolster this view. At this point in the *Mullaney* opinion this Court was discussing problems of proof stating that ". . . proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent: . . ." This portion of the *Mullaney* opinion, was not discussing the role of malice aforethought in Maine.

malice aforethought as an element of the crime of murder in Maine.

> "We reject at the outset Respondent's [e.g. Defendant's] position that we follow the analysis of the District Court and the initial opinion of the First Circuit, both of which held that murder and manslaughter are distinct crimes in Maine, and that malice aforethought is a fact essential to the former and absent in the latter." *Mullaney v. Wilbur, supra* at 690.[6]

Clearly, the Maine law accepted by this Court treated malice aforethought as a policy presumption, connoting no substantive fact required to be proved. *Mullaney v. Wilbur, supra* at 689 n.9. *See State v. Lafferty* (Me.), 309 A.2d 647, 664 (1973) stating ". . . malice aforethought is not, and never has been a fact or probative of other facts"; LaFave and Scott, Handbook on Criminal Law, 539 n.36 (1972). Maine's highest court described malice aforethought in Maine as "linguistically designated" and "a summarizing characterization of the proposition that the intentional killing of one human being by another must bear the heaviest penalty unless extenuated by other circumstances deemed by a wise public policy relevant to the severity of the penalty". *State v. Rollins,* (Me.), 295 A.2d 914, 919, 920 (1972). In sum, the malice aforethought of Maine is a vestigial organ insofar as burden of proof is concerned. *Mullaney v. Wilbur, supra* at 693, n.15.

There is thus no substantive difference between the statutory requirement of proof in New York and Maine at the time of *Mullaney.* Both states require proof of an intentional killing — without more — for murder. The mitigation defenses in Maine,

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[6]*See* Perkins, A Re-examination of Malice Aforethought 43 Yale L.J. 537, 548 (1934). Perkins describes the term "malice aforethought" as "accidental and confusing." He states that historically the phrase simply referred to an intentional killing without justification, excuse or mitigation.

New York, (and indeed most other states and in England)[7] have an identical function in that they reduce murder to manslaughter. These defenses are based on the same principle, namely that intentional murder committed under sufficient loss of control is less culpable than murder committed without such loss of control.

This Court in *Mullaney* rejected an "elements test" for determining the application of the rule of *Winship.*[8] Rather than looking to what a State formally defines as an element of a crime, this Court stated it would look beyond such form in determining which facts in a criminal case the State must prove beyond a reasonable doubt. This Court emphasized it would concern itself with ". . . substance rather than this kind of formalism." 421 U.S. at 699[9]

Despite this clear rejection of an "elements" test for *Winship* purposes, the New York Court of Appeals, nevertheless, applied an elements test to take New York out of the ambit of *Mullaney.*

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[7]*See Mullaney v. Wilbur, supra* at 696.

[8]The so-called "elements test" can be stated thus: in criminal cases a State is only constitutionally required to prove beyond a reasonable doubt those facts that the State characterizes as elements of a particular crime.

[9]Because of this, some commentators view *Mullaney* as having potentially broad application. Allen, *Mullaney v. Wilbur,* The Supreme Court and The Limits of Legitimate Intervention 55 Tex. L. Rev. (No. 2 1977) (copies of page proofs are being prepared by the author for transmittal to this Court); see also, Comment, Unburdening The Criminal Defendant: *Mullaney v. Wilbur* And The Reasonable Doubt Standard, 11 Harv. C.R.—C.L. L. Rev. 390 (1976); Note, Affirmative Defenses And Due Process: The Constitutionality Of Placing A Burden Of Persuasion On A Criminal Defendant, 64 Geo. L.J. 871 (1976).

Another commentator has taken the view that *Mullaney* may only be applicable to murder cases because the rationale of *Mullaney* is to mandate a *mens rea* requirement in murder cases. Tushnet, Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of *Mullaney v. Wilbur,* 55 B.U.L. Rev. 775 (1975).

As has been stated, the *Patterson* majority interpreted Maine law as imposing a burden on the defendant in a murder case to negative malice aforethought, an element of the crime of murder in Maine, in contrast to New York which merely requires the prosecution to prove intent beyond a reasonable doubt. Yet, as a matter of logic and plain reading of the New York homicide statutes, the definition of murder in New York necessarily includes the absence of extreme emotional disturbance. As the *Patterson* dissenters stated:

> "Thus, nothing turns on the fact that Maine gives this absence of the emotional factor a name and New York does not." 39 N.Y.2d at 313, (A. 121).

Further, it is difficult to explain why a mitigating factor such as heat of passion or extreme emotional disturbance reduces murder to manslaughter without stating what facet of murder is lacking when a mitigation is proved. In *Patterson* the trial judge instructed the jury as follows:

> "The point of such proof is to convince you . . . that the defendant's apparent intention to cause death . . . was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." (A. 72, 73).

Another New York Court described it this way:

> ". . . an examination of the record in its entirety reveals an abundance of evidence which would support a finding that the defendant acted without premeditation and deliberateness, and not in extreme emotional disturbance . . ." *People v. Solari*, 43 App. Div.2d 610, 612, 349 N.Y.S.2d 31, 35 (3d Dep't. 1973), *aff'd without opinion*, 35 N.Y.2d 876, 323 N.E.2d 191, 363 N.Y.S.2d 953 (1974).

In a frequently cited case, *People v. Caruso*, 246 N.Y. 437, 446, 159 N.E. 390 (1927), the New York Court of Appeals held

that the then necessary element for first degree murder of premeditation, was not proved where there was shown "sudden and uncontrollable emotion", "hot blood", or "immediate provocation".[10] Thus, while under the Revised Penal Law New York has supposedly "discarded" the concepts of premeditation and deliberation *People v. Patterson, supra* at 299, A. 107, it has retained its mirror-opposite, heat of passion, albeit in the "recast" form of extreme emotional disturbance. *Id.* at 307, (A. 117) (Jones, J. concurring).

Finally, reduction from murder to manslaughter due to mitigating factors has had a long history in the common law during which ~~that~~ mitigation has become inextricably linked to the concept of blameworthiness.[11] See the trial judge's charge to the jury in *Patterson* (A. 79).

Thus, while intent to kill is generally an element of both murder and manslaughter, society has historically deemed

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[10] The *Caruso* case is also instructive on another point. It shows that under prior New York case law, heat of passion was a significant element distinguishing murder in the first degree from murder in the second degree. Thus, the implication in the *Patterson* majority opinion that under prior New York law heat of passion was only relevant to involuntary manslaughter (i.e. no homicidal intent) is seemingly true only on the face of the prior statutes, but not true when the controlling judicial decisions are considered. *People v. Patterson, supra* at 300, (A. 108-109); *see also, People v. Moran*, 249 N.Y. 179, 180, 163 N.E. 553 (1928).

[11] A significant factor in the history of the distinction between murder and manslaughter was the definition of certain killings without malice as being eligible for the benefit of clergy. These killings became manslaughter and the distinction remained even after ecclesiastical jurisdiction was eliminated for secular offenses. See *Mullaney v. Wilbur, supra* at 692-96. *Tushnet*, suggests that *Mullaney* mandates the states to continue this historical distinction in their homicide laws. *Tushnet, supra.* Such a historical basis for the *Mullaney* decision would mean that *Mullaney* is not necessarily applicable to such affirmative defenses as entrapment and the felony-murder defense.

killing done under loss of control as a less culpable form of intent than a killing done in cold blood.[12]

At least in this situation where there is such a unique historical relationship between the mitigation defense and the murder-manslaughter dichotomy, it is important that the "elements test" be rejected; otherwise punishment would be meted out on the basis of formal definitional elements of a crime which in effect become a "tautology", separated from any independent moral basis to justify condemnation and punishment for murder instead of manslaughter. *See* Fletcher, *supra* n.12 at 911. The interests sought to be protected in *Winship* (namely, reliability of verdicts, the significant punishment differential and the stigma attached to the crime) are clearly at stake when a defendant must prove facts which would reduce murder to manslaughter regardless of whether as a formal matter these facts when proved negative an element of the crime as defined by the State.[13]

It thereby follows that the mere classification by a State of facts to be proved as "mitigation factors", *People v. Patterson*, *supra* at 302, (A. 110), rather than as elements of the crime does not justify shifting the persuasion burden to the defendant in a murder trial. *Mullaney v. Wilbur*, *supra* at 698-701.

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[12] *See* Fletcher, Two Kinds of Legal Rules: A Comparative Study of Persuasion Practices in Criminal Cases, 77 Yale L.J. 880 (1968); Wechsler, Codification of the Criminal Law in the United States; The Model Penal Code, 68 Colum. L. Rev. 1425, 1446 (1968); Hart, Punishment and Responsibility (1969) at 14-17; Royal Commission on Capital Punishment, Report, CMD No. 8932 (1953), *quoted in*, Prevezer, The English Homicide Act, 57 Colum. L. Rev. 624, 629-30 (1957). The Commission stated the defect of the crime of murder is that "... it provides a single punishment for a crime widely varying in culpability." Report, *supra* at ¶ 790. *See Prevezer, supra; see also, Morrissette v. United States*, 342 U.S. 246, 250 (1952).

[13] Appellant does not argue that he has no burden of production, *Mullaney v. Wilbur*, *supra* at 701 n.28. It is clear in this case that the defense was properly raised. *People v. Patterson*, *supra* at 304, (A. 113).

A corollary of the above discussion is that nothing turns, *per se*, on whether a State follows the rule of *Commonwealth v. York*, 50 Mass. (9 Met.) 93 (1845). The *Patterson* majority stressed that New York did not follow the *York* case in that New York does not imply malice from the mere fact of intentional killing. *People v. Patterson*, *supra* at 299, (A. 117).[14] Yet it was the effect of the York rule in shifting the persuasion burden of mitigation to the defendant, and not the precise verbal formulation of the *York* rule that was deemed relevant by this Court in *Mullaney*. *Mullaney v. Wilbur*, *supra* at 694-696.

Thus, the fact that New York does not follow the *York* rule does not support the result reached in *Patterson*.

2. *The Liberal Scope of The Extreme Emotional Disturbance Defense Does Not Justify Shifting the Burden.*

The other major factor that the *Patterson* majority cited as a reason for not applying *Mullaney* to the New York affirmative defense of extreme emotional disturbance is that it is more liberal than the common-law heat of passion defense.[15] 39

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[14] The case cited by the *Patterson* majority was *Stokes v. People*, 53 N.Y. 164 (1873) 39 N.Y.2d at 299. *Stokes* held that mere proof of killing does not imply premeditation. New York has since "discarded" the concept of premeditation because it was "nebulous." *People v. Patterson*, *supra* at 299, (A. 107); *see also, People v. Caruso, supra.*

[15] The *Patterson* majority referred to two major sources for its description of the extreme emotional disturbance defense: Model Penal Code §201.3 and Comment (Tent. Draft No. 9 1959) and the Notes of the Staff of the State Commission on Revision of the Criminal Law and Penal Code, Gilbert's Criminal Law and Practice of New York (1967). These are set forth in full in Appendix B to this Brief.* These sources establish two crucial points. First, the extreme emotional disturbance defense is firmly grounded in the common-law heat of passion defense. Second, the phrase extreme emotional disturbance attempts to represent a definitional improvement that is more "logical and fair" to the defendant. These two points are related because the logic and fairness arise from attempts to improve the application of the common-law mitigation from murder to manslaughter, and not to create a wholly new defense.

*Also included in this Appendix are relevant excerpts from Hechtman, Practice Commentary to N.Y. Penal Law §125.20 (McKinney 1975).

N.Y.2d at 302, (A. 111). The reason why this liberality should in essence be a *quid pro quo* for shifting the persuasion burden to the defendant is not articulated in the majority opinion, but the concurring opinion of Chief Judge Breitel does articulate certain arguments relative to the liberality of affirmative defenses generally. 39 N.Y.2d at 305-307, (A. 114-116).

a) *Hardship of Proof does Not Justify Shifting The Persuasion Burden*

Chief Judge Breitel argued that it is unfair to require the prosecution to prove facts peculiarly within the knowledge of the defendant, 39 N.Y.2d at 305-306, (A. 114, 115). This is the more general justification for shifting the burden of persuasion for affirmative defenses. *See*, Hechtman, Practice Commentary to N.Y. Penal Law §25.00 (McKinney 1975) at 62-63; Model Penal Code §1.13, Comment (Tent. Draft No. 4 1955) at 108-114.[16] This was the argument of the State of Maine in *Mullaney* and it was rejected. 421 U.S. at 701-702. The issue thus becomes whether there is anything in the broadened scope of the extreme emotional disturbance defense that mandates a different result.[17]

It is clear that the prosecution has a difficult task to meet the burden of proof in certain areas. The difficulties of proof are evident in an area such as intent which the trial judge in *Patterson* aptly described as a "secret operation of the mind" (A. 71), or, as Mr. Justice Jackson described it — the "elusive mental element". *Morrissette v. United States*, 342 U.S. 246, 248 (1952). Yet difficulty of proof is not a justification for shifting the burden on intent to the defendant. First there are acceptable and easily comprehended methods of proof of inner thought processes. One traditional method is an assessment of a person's conduct and actions and the results which ensue. (See trial Judge's charges in *Patterson*, (A. 69, 70)). In this regard it must be stressed that in determining whether or not a defendant acts under the influence of extreme emotional disturbance, the "ultimate test" is an objective one, even though the concept of extreme emotional disturbance introduces a "larger element of subjectivity" (i.e. reasonable explanation or excuse). Model Penal Code, §201.3, Comment (Tent. Draft No. 9 1959) (at 41). See Appendix B to this Brief.[18] The *Patterson* case is a good example of this objectivity test to assess action and conduct. As the judge charged the jury about the facts ". . . what happened is clear except for minor discrepancies," (A. 73).

Mullaney cites two other factors which are relevant to the validity of the hardship of proof argument. One is that "most States require the prosecutor to prove the absence of passion." 421 U.S. at 701. This consensus is also true of the States adopting the extreme emotional disturbance defense. See Appendix A to this Brief.

The other factor this Court looked to in *Mullaney* was what the State itself required in the way of apportioning the burden of proof on other similar issues and noted that Maine required the prosecution to disprove self-defense. *Mullaney, supra*, at 702.

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[16] Significantly the Model Penal Code does not shift the burden of persuasion to a defendant on its extreme emotional disturbance defense. Model Penal Code §201.3 (Tent. Draft No. 9 1959); Model Penal Code §3.01, Comment (Tent. Draft No. 8 1958) (at 4); Model Penal Code §1.13 (Tent. Draft No. 4 1955) at 108-114.

[17] The convenience of the parties or hardship of proof argument has been criticized as a use of civil procedure which has no place in the criminal law system where the paramount societal interest is in convicting for each specific crime only those who are blameworthy rather than all those who might be blameworthy. Fletcher, *supra* n. 12; *cf. Morrison v. California*, 291 U.S. 82 (1934).

[18] Actually, Maine has characterized heat of passion, per se, as a "subjective condition" which is "in the ultimo" objective because the provocation must be "adequate." *State v. Rollins, supra* at 920. This is a description remarkably similar to the Comments of the Model Penal Code description of extreme emotional disturbance. Model Penal Code §201.3, Comment (Tent. Draft No. 9 1959) (at 41); *see Mullaney, supra* at 702.

With respect to self-defense, this is also true of New York. N.Y. Penal Law §§25.00, 35.00 (McKinney 1975). More significantly, New York traditionally places the ultimate burden of persuasion of disproving insanity on the prosecution. N.Y. Penal Law, §30.05 (McKinney 1975); *People v. Silver*, 33 N.Y.2d 475, 310 N.E.2d 520, 345 N.Y.S.2d 915 (1974); *see also, Davis v. United States*, 160 U.S. 469 (1895).

As a practical matter, as is true of self defense, the extreme emotional disturbance and heat of passion defenses by their nature generally admit the major portion of the prosecution's case. Of necessity, the assertion of such defenses requires an admission from the defendant that he was present at the scene of the crime and that he did, in fact, do the killing. This weakens the force of the hardship argument.

Moreover, this Court made clear in *Mullaney* that the defense must be properly presented and thus a requirement may be imposed on the defendant that he give notice of the defense. *Williams v. Florida*, 399 U.S. 78 (1969); *See* N.Y. Crim. Proc. Law §§250.10 and 250.20 (McKinney 1971) (notice of insanity defense and notice of alibi). Further, where the defense intends to rely on psychiatric testimony, the defendant can be required to submit to pre-trial examination by a prosecution psychiatrist.[19] *Lee v. County Court*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705, *cert. denied*, 404 U.S. 823 (1971). *People v. DiPiazza*, 24 N.Y.2d 342, 248 N.E.2d 412, 200 N.Y.S.2d 545 (1969). Thus, nothing hinders the prosecution from a full investigation into the source of the so-called "subjective facts", to wit, the defendant himself.

There are of course, some situations where because of difficulty of proof the burden may be shifted to the defendant. But

[19] In *Patterson*, the prosecution did in fact have its own psychiatrist examine appellant prior to trial, but the expert witness was not called by the prosecution at trial because he would have supported Appellant's case (A.62; R. 1128).

none of these are analogous to the extreme emotional disturbance defense. These cases deal with specific matter which would normally be only in the defendant's possession and which the defendant is required to produce or lose on that issue. *Rossi v. United States*, 289 U.S. 89 (1933) (defendant must produce bond and registration); *United States v. Fleischman*, 339 U.S. 349 (1950) (evidence of good faith in complying with subpoena); *see also, Morrison v. California*, 291 U.S. 82 (1934); *People v. Felder*, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643, *aff'g.* 39 App. Div. 2d 373, 339 N.Y.S.2d 992 (2d Dep't (1972), *appeal dismissed sub nom, Felder v. New York*, 414 U.S. 948 (1973) (defendant must prove weapon not loaded or inoperable.) Cases of this kind have been analyzed as situations which bear almost no possibility that an innocent defendant may be convicted for failure of proof on the issue in question and it is this reliability factor which allows the burden to be shifted. Ashford and Risinger, Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 180-81 (1969).

The above line of cases and the Ashford and Risinger analysis which justify them do not apply to extreme emotional disturbance any more than to the heat of passion defense for the reasons stated above.

b) ***A Laudable Purpose Does Not Justify Shifting The Burden***

Chief Judge Breitel also makes reference to the "salutary criminological purposes served by the development of affirmative defenses, even where the burden of proof rests on the defendant." *People v. Patterson, supra* at 305, A. 114. By itself, a laudable purpose should not justify shifting the persuasion burden to the defendant. This Court has rejected such an argument where the prosecution had the burden of proof, but by a lesser standard than reasonable doubt. *In re Winship*, 397 U.S. 358, 365-66 (1970); *see also, In re Gault*, 387 U.S. 1, 27,

36 (1967). Since the foregoing cases are set in the context of juvenile proceedings which are saturated with benefical intentions, a laudable purpose argument would have even less force in the context of adult crimes.

The laudable purpose test is, however, coupled with the "political considerations" argument which states that laudable affirmative defenses will not be enacted into law unless legislators can be given a trade-off on the burden issue. *People v. Patterson*, *supra* at 305-306, A. 114-115. There are two things wrong with this argument. First, it is by itself not based on any principle of law.[20] *See* Fletcher, *supra* at 928-29. In a related line of cases this Court has rejected such political arguments. As Justice Marshall has stated:

> A State may not employ an invidious discrimination to sustain the political viability of its programs. As we observed in *Shapiro*, *supra*, at 641, 89 S.Ct., at 1335, "[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme. See also *Cole v. Housing Authority of City of Newport*, 435 F.2d 807, 812-813 (CA 1 1970)." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267 (1974).

Second, this "political considerations" argument is not supported factually. Most of the States adopting the defense of extreme emotional disturbance do not shift the persuasion burden to the defendant. (See Appendix A to this Brief).

Also with regard to the "political considerations argument, the Model Code treatment of entrapment is advanced by Chief Judge Breitel as an example of how a compromise on the burden

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[20] If we assume complete retroactivity on this issue, as the *Patterson* majority did, then this argument, by itself, allows "sacrifice" of appellant and all others convicted of murder since 1967 who raised this defense on the mere possibility that the legislature might deprive future defendants of this defense in murder cases.

issue can yield beneficial results (i.e. the passage of an "ameliorative defense"). *People v. Patterson*, *supra* at 306, A. 116. The point is that the defense of extreme emotional disturbance challenged here was also created by the ALI to ameliorate some of the illogical limitations on the scope of the heat of passion defense. Certainly this was a benefit for a defendant and yet the Model Penal Code clearly did not shift the burden of persuasion to the defendant as the price of the improvement in the law.[21] Beyond this, New York until the passage of the 1967 Revised Penal Code did not require a defendant to carry the burden on any defense including insanity, self-defense, excusability, etc. *See* Hechtman, Practice Commentary to N.Y. Penal Law §25.00 (McKinney 1975) at 62. Significantly, such defenses were judge-made law, but there was no legislative "retaliation" such as is hypothesized in the *Patterson* decision. *See id.* More particularly, the insanity defense was liberalized in 1965 without any *quid pro quo* shift of the burden of proof. *See* Hechtman, Practice Commentary to N.Y. Penal Law §30.05 (McKinney 1975) at 69-70.

A related argument made by Chief Judge Breitel is the suggestion that if a laudable defense which places the burden on the defendant in order to pass the legislature is subsequently declared unconstitutional, the legislative reaction "would be to

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[21] The *Patterson* majority, 39 N.Y.2d at 301, A.109, stated that "the Model Penal Code does not, expressly state that the burden of establishing mitigating circumstances is upon the Defendant." It should be pointed out that the structure of the Model Penal Code is such that the burden shifts to a defendant only when a defense is denominated "affirmative." Extreme emotional disturbance was not denominated as "affirmative defense" by the ALI. *See* Model Penal Code §3.01, Comment (Tent. Draft No. 8 1958) (at 4), where it is also made clear that there was a concern about inroads on the principle that guilt must be established beyond a reasonable doubt. This was in 1958, twelve years prior to *Winship*. *See also* Model Penal Code §1.13, Comment (Tent. Draft No. 4 1955) (especially comments at 109, 111-12). Thus, not expressly stating that extreme emotional disturbance is an affirmative defense *is* stating that the persuasion burden does not shift.

define particular crimes in unqualifiedly general terms, and leave only to sentence the adjustment between offenses of lesser degree," *People v. Patterson, supra* at 305, A. 114-115. This argument has been characterized as "the greater includes the lesser" rule. *See* Ashford and Risinger, Presumptions, Assumptions and Due Process in Criminal Cases; A Theoretical Overview 79 Yale L.J. 165, 177-178 (1969). In essence, the argument is that since a state can punish intentional killing as murder without including any mitigation defense (i.e. the greater), if the state allows a mitigation defense it can shift the burden of persuasion to the defendant on this added beneficial factor (i.e. the lesser).

This argument as stated in *Ferry v. Ramsey*, 277 U.S. 88 (1927), a civil case, has, however, been rejected in criminal cases by this Court in *Tot v. United States*, 319 U.S. 463, 472 n.14 (1973) and *Leary v. United States*, 395 U.S. ~~32-34, 56, 59~~ 6, 32, n.56 33, 34, nn.59-61 n.~~10, 60-61~~ (1969); *see also Romano v. United States*, 382 U.S. 136, 144 (1965); McCormick, Evidence (2d ed. 1972) 812-813 n.21, 818 n.20; Ashford and Risinger, *supra* at 178 n.21; Comment, Unburdening the Criminal Defendant: *Mullaney v. Wilbur*, and the Reasonable Doubt Standard, 11 Harv. C.R.-C.L.L. Rev. 390, 398-400 (1976). In any event this Court in *Mullaney*, without specific reference to the above line of cases, also implicitly rejected this argument in crimes of murder and manslaughter, 421 U.S. at 697-698.

In sum, Appellant contends, assuming *arguendo*, that New York could eliminate its mitigation defense to murder, the answer is it has not chosen to do so. *Tot v. United States, supra; Leary v. United States, supra.* Moreover the possibility of legislative redefinition of crimes to take the issue of mitigation from the jury does not provide a reason for distinguishing the New York rule from the rule declared unconstitutional by this Court in *Mullaney*.

C. THE EROSION OF MULLANEY

Finally, if this Court seeks to distinguish between the closely related "heat of passion" and "extreme emotional disturbance" defenses it will erode the efficacy of *Winship* and *Mullaney*. Once constitutionally relevant distinctions are made between defenses which have a functional, historical and analytical identity, every State with a slightly different interpretation of such words as "passion", "provocation", "hot blood", "cooling off", "distress", "disturbance", "sudden", etc. will have a justification to avoid applying *Mullaney*.[22] *See* LaFave and Austin, Handbook on Criminal Law, 572-582 (1972). The *Patterson* majority stated that with the extreme emotional disturbance defense the "opportunity for mitigation differs significantly from the traditional heat of passion defense. 39 N.Y.2d at 302, A. 111. There was no articulation, however, of why being more liberal or fair or logical translates into any reason for shifting the burden. It is submitted there are no valid reasons for shifting the burden to the defendant where the defense is extreme emotional disturbance instead of its common law antecedent heat of passion. See Appendix B to this Brief.

D. SHIFTING THE BURDEN OF PERSUASION MADE A DIFFERENCE IN THIS CASE.

The love triangle situation is one of the classic contexts for considering the provocation issue. 40 Am. Jur. 2d *Homicide* §65 (1968). The *Patterson* fact pattern clearly fits this situation and there is no question that the defense of extreme emotional disturbance was squarely presented to the jury. *People v. Patterson, supra* at 304, A. 113. Moreover, as the trial judge

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[22] If self-defense or justification is held to be within the ambit of *Winship* and *Mullaney* the same problem will occur because some state definitions of justification are "broader" and more liberal than others. *See State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *cert. granted* U.S. , 45 U.S.L.W. 3292 (1976).

indicated in his charge to the jury, the basic facts were not subject to dispute (A. 73). Most importantly, the psychiatrist hired by the prosecution, who did not testify, agreed with the conclusions of the defense psychiatrist who did testify on the extreme emotional disturbance issue (A. 62; R. 1128), and the jury was instructed that they could "strongly infer" that he would have agreed with the defense psychiatrist (A. 62).

Shifting the burden of proof in this case also stands out in bold relief because this was a close case about which the jury had considerable doubts.[23] This is attested to by the facts that: (1) the deliberations took roughly fifteen hours over a period of two days (A. 82, 85, 86, 87); and (2) the jury made four requests for clarification of the charge. These requests were for a reading of the portion of the charge pertaining to the definitions of the two crimes charged — Murder and Manslaughter, in the First Degree (A. 83, 84); a second reading of those same portions of the charge (A. 92); a copy of the defendant's psychiatrist's report (A. 83); and a copy of defendant's testimony (A. 86-88).

As Mr. Justice Brennan wrote for the Court in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958):

> "there is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."

The margin of error in this case was unconstitutionally enlarged, to Appellant's detriment, and, therefore, this conviction must be reversed.

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[23] *See* Shapiro, Affirmative Defenses After *Mullaney v. Wilbur:* New York's Extreme Emotional Disturbance, 43 Brook. L. Rev. 171 (1976).

POINT II

THE INSANITY DEFENSE IS CLEARLY DISTINGUISHABLE FROM THE EXTREME EMOTIONAL DISTURBANCE DEFENSE.

The Appellee has cited cases upholding the requirement that the defendant bear the burden of proving insanity in support of the proposition that *Patterson* is consistent with other jurisdictions in applying *Mullaney* (Point A (5) of Appellee's Motion). The implication of Appellee's reliance upon insanity cases is that placing the burden of proving insanity upon the defendant is constitutional.[24] Appellant submits that the defense of emotional disturbance cannot be equated with the insanity defense.

1. *The Defenses are Separate and Distinct in the New York Statutes.*

The *Patterson* majority did not base any part of their decision on a claim that extreme emotional disturbance should be treated constitutionally in the same manner as the insanity defense. Extreme emotional disturbance and insanity are two legally distinct defenses in New York; and, most significantly, New York does not shift the persuasion burden on insanity as it does with extreme emotional disturbance. N.Y. Penal Law §30.05 (McKinney 1975); *Brotherton v. People*, 75 N.Y. 159 (1878);

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[24] *See Mullaney, supra*, 704-706 (Rehnquist, J. with Burger, C.J., concurring); *Leland v. Oregon*, 343 U.S. 790 (1952); *Rivera v. State*, 351 A.2d 561 (Del.), *appeal dismissed sub nom. Rivera v. Delaware*, U.S. , 45 U.S.L.W. 3279 (1976); *but see, Davis v. United States*, 160 U.S. 469 (1895); *Buzynski v. Oliver*, 538 F.2d 6 (1st Cir. 1976); *United States v. Eichberg*, 439 F.2d 620, 624 (D.C. Cir. 1971) (per curiam) (Bazelon, C.J. dissenting); *United States v. Rustin*, 533 F.2d 879, 890, n.33 (3rd Cir. 1976) (Adams, J., dissenting); *see also*, Note, Constitutional Limitations on Allocating the Burden of Proof of Insanity To The Defendant In Murder Cases, 56 B.U.L. Rev. 499 (1976).

People v. Silver, 33 N.Y.2d 475, 310 N.E.2d 520, 345 N.Y.S.2d 915 (1974).

2. *The Defenses are Different in Concept and Legal Function.*

Other responses to an attempt to lump extreme emotional disturbance with insanity proceed along different analytic lines. One is that extreme emotional disturbance, like its forebear heat of passion, is the distinguishing element between two of the gravest common law crimes — murder and manslaughter. Thus, for burden of proof purposes, as a matter of substance, these defenses go necessarily to a mental element (albeit a negative one) of the crime of murder (when put in issue), regardless of what *formal* label (i.e. mitigation) a state may give it. *Mullaney v. Wilbur*, *supra* at 699. At least insofar as the concurring opinion in *Mullaney* is concerned, this analysis of the heat of passion defense distinguishes it from insanity because:

> ". . . legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Id.* at 706.[25]

Like the heat of passion defense, extreme emotional disturbance warrants the same analytic distinction from the insanity defense. The function of both the heat of passion and extreme emotional disturbance defenses is identical — both defenses warrant *reducing* murder to manslaughter because of a less culpable form of intent. Insanity, on the other hand,

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[25]See Note, *supra*, 56 B.U.L. Rev. at 499 *et seq.*, where it is pointed out that because of the diversity of state-by-state interpretations of insanity the proposition quoted above, may be applicable only to those state rules where *in fact* there is no necessary relationship to the required mental element. In any event, where proof of a fact distinguishes manslaughter from murder, this fact necessarily goes directly to the required mental element of murder; otherwise there is no reason for the distinction. Therefore, it is the very concept of heat of passion and extreme emotional disturbance, not a state-by-state analysis that is determinative.

exonerates a defendant from criminal liability entirely. A defendant convicted of a reduced crime of manslaughter is not exonerated, but rather he may be given a lesser penal sanction than would have been imposed for a conviction for murder. When insanity is proved, the defendant does not receive a penal sanction because incarceration will have no deterrent or rehabilitative effect on a person who is insane. The criminal process in such a case fulfills no purpose. *See* Chernoff and Schaeffer, Defending the Mentally Ill: Ethical Quicksand, 10 Am Crim. L. Rev. 505, 506 (1972); Wechsler, *supra*.

The difference in the focus of the inquiry between insanity and heat of passion/extreme emotional disturbance is critical. With heat of passion/extreme emotional disturbance, the inquiry centers on establishing the "required mental element"[26] for the crime of murder or manslaughter; with insanity, the inquiry is directed to the defendant's mental status for the purpose of determining whether or not *any* penal sanction is appropriate. *See* Comment, Unburdening the Criminal Defendant; *Mullaney v. Wilbur* and the Reasonable Doubt Standard, 11 Harv. C.R.-C.L.L. Rev. 390, 405 n. 65 (1976); Hart, Punishment and Responsibility, 188-209 (1968).

3. *There is a Qualitative Difference in the Hardship of Disproving Each Defense.*

There is another analysis of the insanity defense which arguably affects the extreme emotional disturbance defense as distinguished from the heat of passion defense. Proponents of the "hardship of proof" argument note that since insanity is a much more subjective defense requiring proof concerning the defendant's state of mind and behavior, it is fair to place the

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[26]See *People v. Patterson*, *supra* at 304, A.113, where the majority stated: ". . . the defendant had not established that his intent was formulated under the influence of an extreme mental trauma."

burden on the party asserting it. *See Buzynski v. Oliver*, 538 F.2d 6 (1st Cir. 1976).[27] Appellant's general response to the hardship of proof argument is set footh in Point I.B (2-a).

Specifically with reference to a comparison to insanity, defendant contends that extreme emotional disturbance like heat of passion is ultimately based on an objective standard while insanity is subjective. *Mullaney v. Wilbur*, *supra* at 702.

The issue with insanity is whether or not the defendant himself is insane, without regard to any external triggering mechanism or provocation. The reasons why a defendant is insane are not, *per se*, relevant. The focus is thus of necessity internal and subjective. Extreme emotional disturbance, on the other hand, refers not only to the reasons *why* the defendant lost control, but also asks whether there is "*reasonable* explanation or excuse" for the defendant's conduct. It is true that "the reasonableness . . . is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be," and this introduces some subjectivity,[28] but in the words of those responsible for the formulation of the extreme emotional disturbance defense, the "ultimate test" is objective. Model Penal Code §201.3 Comment (Tent. Draft No. 9 1959) (at 41, 46-48); (Appendix B-1 — B-3 of this Brief).

The *Patterson* case is a good example of the ultimate objective standard applied to an extreme emotional disturbance defense. The definition of the defense provided to the jury by the court

[27]Since New York places the ultimate burden of persuasion for insanity on the prosecution, it is difficult to see how this argument carries weight insofar as New York is concerned.

[28]As defendant has already pointed out even Maine has described heat of passion as basically subjective, but made objective because the ultimate test is the adequacy of the provocation. *State v. Rollins*, *supra*, 919, 920. Under former law, New York has described "heat of passion" as "primarily being a state of mind." *People v. Peetz*, 7 N.Y.2d 147, 151, 164 N.E.2d 384, 196 N.Y.S.2d 83 (1959).

was starkly simple — "self evident in meaning" *People v. Patterson*, *supra* at 293, (A.99). The Court instructed the jury that the basic facts upon which they were to make their determination of the affirmative defense were not in dispute (A.73). These facts and events included the stormy marital relationship, the discovery by appellant of his wife's illicit affair with the victim, the exchange of Christmas presents, the fateful sermon two days later, and finally the discovery by Appellant later that evening of his wife half undressed in the presence of her lover are all relevant and essentially objective circumstances.

The psychiatric testimony in *Patterson* was laced with reference to facts and events which were the subject of proof at trial (A.3-37).[29] This is to be compared with the conclusions of psychiatrists in cases of insanity such as "psychopathic personality", "psychopathic trait disturbance" and "schizophrenic paranoid". *People v. DiPiazza*, 24 N.Y.2d 342, 349-50, 248 N.E.2d 412, 300 N.Y.S. 2d 545, 551 (1969); *People v. Lee*, 29 App. Div. 2d 837, 277 N.Y.S. 2d 607, 608 (4th Dep't 1968).

Thus, as a matter of proof, extreme emotional disturbance is clearly more within the ambit of the heat of passion defense (*Mullaney v. Wilbur*, *supra* at 702) than the subjective behavioral criteria applicable to a determination of insanity.[30]

[29]The mere fact that psychiatric testimony was presented can be of no particular significance since psychiatrists are also used in "heat of passion" cases. *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286, 287 n.1 (1972).

[30]Extreme emotional disturbance has no psychiatric diagnostic classification. *People v. Shelton*, Misc.2d , 385 N.Y.S.2d 708, 715-716 (Sup. Ct. N.Y. Co. 1976).

> "In order to arrive at a definition of 'extreme emotional disturbance' to apply to defendant's actions in this case, I asked both forensic psychiatrists to state their understanding of the term. (Both are very experienced witnesses who have given expert testimony in hundreds of cases.)
>
> "They agreed that this term is a creature of law and has no diagnostic classification in the Diagnostic and Statistical Manual of the American Psychiatric Association."

4. *State Practices Do Not Support Shifting The Burden On Extreme Emotional Disturbance.*

A fourth response to the attempt to lump extreme emotional disturbance with insanity is that the inquiry into state practices so important to sustaining the shift in burden on insanity in *Leland* (*Leland v. Oregon*, *supra* at 798) cuts the opposite way with the defense of extreme emotional disturbance. Appendix A to this Brief shows that most states adopting the ALI Model Penal Code defense place the burden on the prosecution. Moreover, since the Model Penal Code defense is firmly grounded in the common law heat of passion defense, the state practice on this defense is also relevant and the clear trend is "toward requiring the prosecution to bear the ultimate burden of proving this fact." *Mullaney v. Wilbur*, *supra* at 696.

5. *New York Has Eschewed A Presumption Analysis Of Extreme Emotional Disturbance.*

Finally, it should be noted that the burden of proof issue on the insanity defense is bound up with the presumption[31] of "all English-speaking courts" that all men are sane. *Leland v. Oregon*, *supra* at 799. In this regard it is important to note that New York has eschewed a presumption analysis with regard to extreme emotional disturbance. *People v. Patterson*, *supra* at 299, (A.107).[32] Nor did *Mullaney* proceed on a presumption analysis. *Mullaney v. Wilbur*, *supra*, at 702 n. 31. In fact, it is difficult to perceive how a killing in the "love triangle" context could be presumed not to be in the heat of passion when the context is the most common one for asserting the heat of passion

[31] In fact this was referred to as a "doctrine" in *Leland*. *Leland v. Oregon*, *supra* at 796.

[32] *Compare People v. Felder*, 32 N.Y.2d 747, 297 N.E.2d 522, 344 N.Y.S.2d 643 (1973), *aff'g.* 39 App. Div. 2d 373, 339 N.Y.S.2d 992 (2d Dep't 1972), *appeal dismissed sub nom. Felder v. New York*, 414 U.S. 948 (1973). This decision was based on a presumption analysis.

type of defense. 40 Am. Jur. 2d *Homicide* §65 (1968). *See also*, Model Penal Code §1.13, Comment (Tent. Draft No. 4 1955). Further a presumption analysis cannot justify shifting the persuasion burden to the defendant. In the terms used by Ashford and Risinger, *supra*, such a shift would be denominated an "assumption" (*i.e.* a presumption that in fact does more than require a defendant to show "some evidence" to rebut the presumption).[33] This clearly is in conflict with the persuasion burden required by *Mullaney*. *Mullaney v. Wilbur*, *supra* at 702-703 and n.31; *see also Lavine v. Milne*, U.S. , 96 S.Ct. 1010, 1016 n.10 (1976).

Thus, no factor which supports shifting the burden of persuasion for the insanity defense supports a similar shift for the extreme emotional disturbance defense.

[33] See Note, Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant, 64 Geo. L.J. 871, 883 (1976); *see also, United States v. Hendrix*, F.2d , N.Y.L.J. at 1, col. 6 (10/25/76) (2d Cir. 1976) where the court stated:

"We have, in matters involving other presumptions, consistently held that a true presumption is a procedural device, not evidence; and that, when proof in rebuttal is introduced, the presumption is out of the case. (citations omitted)

> "This is the so-called "Thayer" Rule which has been adopted by the American Law Institute in its Model Code of Evidence, Rule 704(2), and is favored by most authorities in the field of evidence. *See* 9 Wigmore, Evidence, Section 2491 at 289 (1940); H. Weihofen, Insanity as a Defense in Criminal Law, 162 (1933); Richardson on Evidence, Section 63 (10th ed. 1973); Reaugh, Presumptions and the Burden of Proof, 36 Ill. L. Rev. 703, 833 (1942); *but cf.* McCormick, Evidence, Section 316 at 665 et seq. (1954)." *United States v. Hendrix*, *supra*, at p. 17, col. 3.

POINT III

RETROACTIVITY IS NOT A BAR TO CONSIDERATION OF THE PATTERSON CASE WHICH REACHES THIS COURT ON DIRECT APPEAL.

The New York Court of Appeals, in order to reach the constitutional issue in *Patterson*, explicitly held that *Mullaney* should be given retroactive effect. *People v. Patterson*, *supra* at 296, (A.103). The charge to the jury was given in *Patterson* on June 7, 1971, *Id.* at 294, (A.100), but the case was decided on direct appeal and comes before this Court on direct appeal. The dispositive argument favoring complete retroactivity[34] is that *Mullaney* was based on *Winship* which was held by this Court to have complete retroactive effect in *Ivan v. City of New York*, 407 U.S. 203 (1972). *Mullaney v. Wilbur*, *supra* at 296, (A.103).

Yet even without this fairly clear indication in *Mullaney* itself, the issue presented by this appeal passes the test set forth for determining retroactivity. This test has been stated in various ways, but devolves to this threshold question: Does the new ruling to be applied affect the very integrity of the fact finding process? *Linkletter v. Walker*, 381 U.S. 618 (1965); *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Johnson v. New Jersey*, 384 U.S. 719 (1966).

In *Williams v. United States*, 401 U.S. 646, 653 (1971), the test was stated as follows:

> "... Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance

[34] Since this matter comes to this Court on direct appeal Appellant need not prevail on complete retroactivity. *See*, *Linkletter v. Walker*, 381 U.S. 618 (1965).

> by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." (footnote omitted).

Since the *Mullaney* ruling deals with the application of the reasonable doubt standard which forms the framework for determining guilt or innocence for specific crimes, it should by this standard be given retroactive effect.

CONCLUSION

In conclusion, defendant contends that *Winship* and *Mullaney* control this appeal. The New York affirmative defense of extreme emotional disturbance is functionally identical to the Maine heat of passion defense declared unconstitutional because of the shifting of the burden in *Mullaney*. Substance should control form and thus Maine's use of the phrase "malice aforethought", found by this Court to be a policy presumption only and not a fact to be proved, should have no weight in distinguishing the New York defense. The more liberal wording of the New York defense similarly provides no reason for allowing the burden to be shifted to defendant, particularly since the defense is based on the ALI Model Penal Code defense which does not shift the burden. Further, the *Winship* analysis by this Court in *Mullaney* applies with equal analytic force to the extreme emotional disturbance defense. Finally, if a qualitative distinction between these functionally identical defenses is found which justifies not applying *Mullaney*, then *Mullaney* itself will be eroded because of the variety of practices among the states in defining and applying the heat of passion defense.

For the reasons stated in this brief, it is respectfully submitted that the decision of the New York Court of Appeals should be reversed and a new trial should be ordered.

Dated: December, 1976

Respectfully submitted,

Betty D. Friedlander
Victor J. Rubino
Attorneys for Appellant

(affidavit of service omitted in printing)

APPENDICES

APPENDIX A

STATE PRACTICES ON PLACING THE BURDEN OF PERSUASION ON THE EXTREME EMOTIONAL DISTURBANCE DEFENSE

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Arkansas	State	Ark. Stat. Ann. §41-1502 (Supp. 1976)	Ark. Stat. Ann. §§41-110, 41-115 (Supp. 1976)
Conn.	~~State~~ Defendent	Conn. Gen. Stat. §53a-54a (1975)	*State v. Anonymous (1976-5)*, 33 Conn. Supp. 28. 359 A.2d 715 (Superior Ct. 1976), holds murder statute unconstitutional insofar as it required defendant to prove extreme emotional disturbance by preponderance of the evidence.
Delaware	State	Del. Code 11 §636 (Supp. 1975)	*Fuentes v. State*, 349 A.2d 1 (1976) (holds Del. Code 11 §641 (1975) unconstitutional because statute required that defendant prove mitigating circumstances of "extreme emotional distress" by preponderance of evidence.)

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Hawaii	State	1972 Haw. Sess. Laws 37 §§701, 702 (1973)	1972 Haw. Sess. Laws 37 §115 (1973). Section 702 terms extreme mental or emotional defense a "defense." Section 115 only requires that defendant raise a reasonable doubt in order to succeed on a particular defense.
Kentucky	State	Ky. Rev. Stat. Ann. §507.020 (Supp. 1976)	Ky. Rev. Stat. Ann. §500.75 (1975) merely places the burden of going forward on a defendant who asserts the defense of extreme emotional disturbance.
Maine	State	Me. Rev. Stat. 17-A §204 (Supp. 1976)	Predecessor of present section 204 required defendant to prove extreme emotional disturbance by a preponderance of the evidence. Me. Rev. Stat. 17-A §204 (Supp. 1975). In 1975 the Maine Legislature repealed that language.

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Montana	State	Mont. Rev. Codes Ann. §§94-5-102, 94-5-103 (Supp. 1973)	It is settled law in Montana that a defendant need only raise a reasonable doubt when asserting a defense affirmative or otherwise. *See State v. Grady*, 166 Mont. 168, 531 P.2d 681 (1975).
New Hampshire	State	N.H. Rev. Stat. Ann. §§630:1a, 630:1b, 630:2 (1974)	N.H. Rev. Stat. Ann. §626:7 (1974) places the burden of persuasion on the defendant only when a defense is explicitly labelled an "affirmative" defense. "Extreme mental or emotional disturbance" N.H. Rev. Stat. Ann. §630:2 (1974) is not labelled as an "affirmative defense."
North Dakota	State	N.D. Cent. Code §12.1-16-02 (1976)	N.D. Cent. Code §12.1-01-03 (1976) requires that a defendant merely raise a reasonable doubt on any issue which is not explicitly labelled an "affirmative defense" by statute. "Extreme emotional disturbance" is not so labelled.

State	Burden of Persuasion	Relevant Homicide Statute(s)	Basis For Conclusion Concerning The Burden
Ohio	State	Ohio Rev. Code Ann. §§2903.01-2903.03 (Page 1975)	Ohio Rev. Code Ann. §2901-05 (Page 1975).
Oregon	State	Or. Rev. Stat. §§ 163.005, 163.115, 163.125 (1975)	*State v. Siens*, 12 Or. App. 97, 504 P.2d 1056 (1973), *construing* Or. Rev. Stat. §161.055 (1973) (Defendant merely has duty of going forward with extreme-emotional-distress defense).
Utah	State	Utah Code Ann. §§76-5-201 to 76-5-205 (Supp. 1975)	Utah Code Ann. §77-31-12 (1953) states that the defendant has burden of proving mitigating circumstances, but case law has consistently interpreted the statutory language as meaning that defendant merely has burden of going forward. *State v. Harris*, 58 Utah 331, 199 P. 415 (1921); *State v. Dewey*, 41 Utah 538, 127 P. 275 (1912).

APPENDIX B

The History of the Extreme Emotional Disturbance Defense

Taken from Model Penal Code §201.3, Comments (Tent. Draft No. 9 1959) at 41, 46, 48:

Finally, the class of cases which would otherwise be murder but may be reduced to manslaughter under the present law because the homicidal act occurred "in heat of passion" upon "adequate provocation" is substantially enlarged by paragraph (1)(b). The draft reframes entirely the decisive question, asking whether the homicide was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse" and adding that the "reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."

We thus treat on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. We also introduce a larger element of subjectivity in the appraisal, though it is only the actor's "situation" and "the circumstances as he believes them to be", not his scheme of moral values, that are thus to be considered. The ultimate test, however, is objective: there must be "reasonable" explanation or excuse for the actor's disturbance. This is, we think, to state in fair and realistic terms the criteria by which men do and should appraise the mitigating import of mental or emotional distress when it is a factor in so grave a crime as homicide. The major difficulty with the criterion of premeditation and deliberation as a decisive test, is, indeed, that taken seriously it would rest decision on the fact of the disturbance, without attention to its cause; that probably is

why it is so generally nullified in practice. (Citations omitted) Comments, *supra* at 41.

* * *

5. *Mental or Emotional Disturbance.* Paragraph (1)(b) widens, as we have said, the class of homicides which may be reduced from murder to manslaughter under existing law because they are committed when the actor suffers from extreme emotional disturbance, the "heat of passion" of the common law.

In the first place, the draft does not confine the mitigation to cases of provocation in the ordinary meaning of the term, i.e., an injury, injustice or affront perpetrated by the deceased on the actor. While the traditional concept has been extended by some courts to cases where the actor was mistaken in believing that his victim was responsible for the provocative injury or even that the injury occurred, the extension hardly can go far enough to comprehend the actor provoked by A who strikes at B in blind distress. There may be difficulty also with the case where the actor is distressed by witnessing or learning of an injury to someone else or even by erroneous belief in its occurrence. Such excluded cases may, however, be among the strongest for the mitigation, since both the cause and the intensity of the actor's emotion may be relatively less indicative of depravity of character than a homicidal response to a blow. By referring to "extreme mental or emotional disturbance for which there is reasonable explanation or excuse" rather than to provocation, the draft avoids a merely arbitrary limitation on the nature of the antecedent circumstances that may justify a mitigation when the homicidal actor was in great distress.

Secondly, the formulation sweeps away the rigid rules that have developed with respect to the sufficiency of particular types

of provocation, such as the rule that words alone can never be enough. Given evidence of extreme mental or emotional disturbance, the question whether it is based on "reasonable explanation or excuse" may be confronted, as we think it should be, in the light of all the circumstances in the case.

Thirdly, and most importantly, the formulation seeks to qualify the rigorous objectivity of the prevailing law insofar as it judges the sufficiency of provocation by its effect on the reasonable man. To require, as the rule is sometimes stated, that the provocation be enough to make a reasonable man do as the defendant did is patently absurd; the reasonable man quite plainly does not kill. But even the correct and the more common statement of the rule, that the provocative circumstance must be sufficient to deprive a reasonable or an ordinary man of self-control, leaves much to be desired since it totally excludes any attention to the special situation of the actor. Not only is the actor's temperament deemed immaterial or the fact that he was drunk but, as the House of Lords has recently declared, "infirmity of body or affliction of the mind" are both irrelevant. The same position holds respecting "cooling time", which also must be judged by the time required for relief from tension by the hypothetical reasonable man.

Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor's character

that it is fair to draw upon the basis of his act. So too in such a situation as *Gounagias, supra*, where lapse of time increased rather than diminished the extent of the outrage perpetrated on the actor, as he became aware that his disgrace was known, it was shocking in our view to hold this vital fact to be irrelevant.

> "We submit that the information in the draft affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material for purposes of sentence and those which properly should be ignored. We say that there must be a 'reasonable explanation or excuse' for the extreme disturbance of the actor; and that the reasonableness of any explanation or excuse 'shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.' There will be room, of course, for interpretation of the breadth of meaning carried by the word 'situation', precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced." (Footnotes and citations omitted.) Comments, *supra*, at 46-48.

The Revised New York Penal Law of 1967 which adopted the ALI Model Penal Code defense of "extreme emotional disturbance" was the product of the State Commission on Revision of the Penal Law and Criminal Code. The Staff Notes of this Commission describe the defense as follows:

"Subdivision 2 also presents an offense grounded in the common law but new to New York. The common law enunciates the seemingly sound doctrine, known as voluntary manslaughter and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed 'heat of passion,' 'sudden passion,' 'provocation' and the like. New York and a few other jurisdictions having similar statutory patterns evidently were vaguely aware of this doctrine but confused and destroyed it in the creation of their manslaughter provisions, all of which apply only where there is no 'design to effect death' (existing P.L. §§1050, 1052). While, therefore, the Penal Law contains two manslaughter provisions speaking of a killing 'in the heat of passion' [existing §§1050(2), 1052(2)], neither is applicable to intentional killings, the very basis of the whole doctrine. Instead of enunciating the traditional principle that murder by intentional killing is mitigated and reduced to manslaughter by 'heat of passion,' these provisions define a narrow and rather meaningless offense which is committed by a fatal assault without homicidal intent and 'in the heat of passion.' Thus, 'heat of passion' is erroneously predicated not as a mitigating factor reducing a homicide from murder to manslaughter but as an affirmative element of the specified form of manslaughter.

"The proposed provision eliminates this hybrid offense and replaces it with the traditional crime embracing the principle of mitigation. In the process, the phrase, 'in the heat of passion,' is abandoned as the criterion of mitigation in favor of the phrase, 'under the influence of extreme emotional disturbance for which

there is a reasonable explanation or excuse.' This standard, adopted from the equivalent manslaughter provision of the Model Penal Code [§210.3(b)], is, in the Commission's opinion, superior to 'heat of passion' and other traditional criteria from the standpoint of both logic and general fairness (see Model Penal Code Commentary, Tentative Draft No. 9, pp. 28-29)." Gilbert's Criminal Law and Practice of New York (1967), pp. 1C-61 - 1C-62.

The Practice Commentaries to New York Penal Law §125.20 (Hechtman, Practice Commentaries to N.Y. Penal Law §125.20 (McKinneys 1975) State *inter alia* at 391, 393:

"The common law enunciates the seemingly sound doctrine, known as 'voluntary manslaughter' and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed 'heat of passion,' 'sudden passion,' 'provocation,' and the like (1 Warren on Homicide [Perm. Ed.] § 85, pp. 416-417). The theory of the principle is one of extending a degree of mercy to a defendant who, though intending to kill, acted out of some kind of emotional disturbance rather than in cold blood."

* * *

"Subdivision 2, in conjunction with a provision of the revised murder statute (§ 125.25[1a]), restores to New York the aforementioned common law doctrine of reduction from murder to manslaughter on the basis of 'heat of passion.' In the restoration process, however, the phrase 'in the heat of passion' is abandoned as the

criterion of mitigation in favor of the phrase, 'under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse' (§ 125.25[1a]). The latter standard is adopted from the Model Penal Code of the American Law Institute (§ 210.3[b]), and the reasons prompting this change are fully expounded in the Institute's commentaries (Model Penal Code Commentary, Tent. Draft No. 9, pp. 28-29)."

In The

Supreme Court of the United States

October Term 1976

No. 75-1861

GORDON G. PATTERSON, JR.,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Appeal from the
New York Court of Appeals

BRIEF FOR THE [redacted] APPELLEE

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BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

Whether New York's affirmative defense of extreme emotional disturbance, which permits a defendant against whom the crime of murder has been proved beyond a reasonable doubt to reduce murder to manslaughter by establishing by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance, comports with due process.

STATUTES INVOLVED

N.Y. Penal Law §125.25 Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; . . .

N.Y. Penal Law §125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; . . . .

N.Y. Penal Law §25.00 Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellant was convicted following a trial by jury of the crime of murder. The facts, as summarized in the court below, are as follows:

The defendant, Gordon Patterson, and his wife, Roberta, had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults. As a result of one such incident, Roberta Patterson left her husband and instituted divorce proceedings. She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to the defendant. On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him. The defendant confessed to the killing and, after a hearing, the confession was held voluntary and was admitted into evidence against him at trial. Defendant's wife, an eyewitness to the crime, testified, over objection of defense counsel, that defendant fired two shots at the victim from close range. The defense called eleven witnesses, including the defendant, who testified in great detail as to the defendant's life and particularly that period of his life when he was married to Roberta Patterson. The defense at the trial was that the crime, if there was one, was unintentional. This was based on defendant's version of events to the effect that the gun went off

accidentally. Defendant also raised the affirmative defense that at the time of the alleged crime, he was acting under the influence of extreme emotional disturbance.

The court's charge to the jury was based on the homicide provisions of the Penal Law (§§125.25 [subd (1) (a)], 125.20 [subd (2)]). The jury was instructed that "[t]he mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond a reasonable doubt that the defendant acted intentionally." The People were required to establish beyond a reasonable doubt that the defendant "intended, in firing the gun, to kill either the victim himself or some other human being." To find intent, the jury had to conclude that the defendant had the "conscious objective to cause death and that his act or acts resulted from that conscious objective." The jury was cautioned that they "must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

With respect to the defense of extreme emotional disturbance, the court stated that the point of this evidence was to convince the jury, by a preponderance of the evidence, that "the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." The court did not elaborate on the definition of "extreme emotional disturbance", noting that the words are "self-evident in meaning". However, the court cautioned that "'extreme' precludes mere annoyance or

unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it." As to the burden of proof, the court repeated its earlier instruction that "generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse."

Finally, the court instructed the jury that "[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree * * *". The Court went on to explain that "[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder." No objection was taken to the above quoted portions of the court's charge.

The jury found the defendant guilty of murder. The Appellate Division unanimously affirmed the judgment of conviction.

* * *

In May 1973, when the Appellate Division affirmed the judgment of conviction, there was no intimation that the homicide provisions might be vulnerable to serious constitutional challenge. In fact, the initial brief filed by appellant in our court did not raise a due process argument. The point was raised for the first time in a supplemental brief prepared after *Mullaney* was handed down.

A (96-101)*

*Numerical references preceded by "A" are to the Appendix to Appellant's brief.

The New York Court of Appeals agreed to consider the issue of the constitutionality of the affirmative defense of extreme emotional disturbance even though the defendant had failed to object to the trial court's charge on this point, "[s]ince the error complained of goes to the essential validity of the proceedings conducted below . . . ." (A103). The Court also decided that *Mullaney* should be given retroactive effect enabling the defendant to assert this claim, although his conviction predates the *Mullaney* decision.

In a four-to-three decision, the Court of Appeals upheld the constitutionality of the statute, the majority concluding that "the New York law of homicide differs significantly from the Maine law struck down in Mullaney." (A103-104). In separate concurring opinions, Chief Judge Breitel pointed out "the salutary criminological purposes served by the development of affirmative defenses, . . ." and Associate Judge Jones concluded that since "[o]ur Legislature has carefully and thoughtfully revised our State's Penal Law" and "the intelligent use of affirmative defenses makes eminently sound sense in the criminal law today," the statute should not be declared unconstitutional in the absence of more explicit authority than the *Mullaney* decision (A19, A22). The dissenters concluded that "[u]nder *Mullaney*, there is no alternative but to hold [the affirmative defense of extreme emotional disturbance statute] unconstitutional as a violation of the due process provision of the Fourteenth Amendment."

SUMMARY OF THE ARGUMENT

New York's affirmative defense to murder of extreme emotional disturbance does not violate due process as construed by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 357 (1970). Unlike the statutes declared void in each of those cases, the New York statute in the instant case places the burden of proof on the prosecution to prove the elements of the crime charged beyond a reasonable doubt.

Although the New York statute appears similar to the Maine statute struck down in *Mullaney*, the fundamental and significant distinctions between the two statutes become readily apparent upon a reexamination of the basis of the *Mullaney* decision. The confusion and controversy engendered by that decision make it imperative that this Court seize the opportunity presented by the instant case to clearly articulate the scope of that decision.

Respondent urges this Court to declare that the decision in *Mullaney* applied only to the Maine statute and the unique defect contained therein and that affirmative defenses, in general, are not prohibited by the Constitution. Absent such a declaration, there will undoubtedly be endless litigation concerning the constitutionality of scores of affirmative defenses promulgated by many states such as New York, whose affirmative defenses are set forth in a table appended to respondent's brief.

The defect in the Maine statute that was the basis for this Court's holding that it violated due process was that the prosecution did not have to prove the element of intent beyond a reasonable doubt to gain a conviction for the crime of murder. Under the Maine statute, the prosecution need only have proved the requisite intent for manslaughter to achieve a conviction for murder.

The defect in the Maine statute is not present in New York's homicide statute. In New York, the prosecution must prove all elements of the crime of the murder, including intent to cause death before the defendant is given the chance to reduce murder to manslaughter by proving by a preponderance of the evidence that he acted under an extreme emotional disturbance. The New York statute thereby satisfies the *Winship* rule that the reasonable doubt standard applies to every fact necessary to constitute the crime with which the defendant is charged.

No significant difference regarding burden of proof exists between New York's affirmative defense of extreme emotional disturbance and the affirmative defense of insanity upheld by this Court in *Leland v. Oregon*, 343 U.S. 790 (1952), and *Rivera v. Delaware*, U.S. , 20 CrL 4030 (1976), and every state that has recently considered the question. The defense of extreme emotional disturbance places less of a burden upon a defendant than does the defense of insanity, since the former only mitigates the crime charged, requires less reliance on expert testimony and contains a sympathy-arousal aspect. The defense of insanity relates to the issue of the defendant's guilt or innocence, virtually requires the use of expert testimony, and is not conducive to sympathy arousal in the eyes of a jury. The New York statute in the instant case should, therefore, satisfy due process as readily, if not more so, than the statutes upheld in *Leland* and *Rivera*.

Finally, should this Court reach the issue of retroactive application of *Mullaney v. Wilbur* in this case, respondent urges that *Mullaney* not be given retroactive effect. The arguments against retroactivity are set forth in the respondent's brief in *Hankerson v. North Carolina* (No. 75-6568) where the retroactivity issue, unlike in the *Patterson* case, is squarely presented.

POINT I

New York's affirmative defense to murder of extreme emotional disturbance does not violate due process.

Appellant contends that this Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 357 (1970) mandate a reversal of the New York Court of Appeals decision below upholding the constitutionality of New York's affirmative defense to murder of extreme emotional disturbance. Under New York's Penal Law, the burden is on the defendant to prove by a preponderance of the evidence that he was acting under the influence of extreme emotional disturbance in order to reduce murder to manslaughter. N.Y. Penal Law §§125.25, 125.20, 25.00. Appellant contends that the New York affirmative defense is "functionally identical" to the Maine statute declared unconstitutional by this Court in *Mullaney*, that the majority opinion below misread the *Mullaney* decision in upholding the New York affirmative defense, that affirming the Court of Appeals decision would result in the "erosion" of *Mullaney*, and that "shifting the burden of persuasion made a difference in this case."

It is respectfully submitted that appellant errs in his analysis of the *Winship* and *Mullaney* decisions and that a reversal of the decision below is not constitutionally mandated. Specifically, it is respondent's position that the constitutional defect in the Maine statute is not present in the New York statute. In New York, the burden of proof in a murder prosecution is at all times on the People to prove the elements of the crime of *murder* beyond a reasonable doubt, whereas in Maine the People did not have to prove all the elements of the crime of *murder* beyond a reasonable doubt. The defect was, in essence, the *absence* of a constitutionally mandated burden on the People to prove the crime of murder and not the *presence* of a burden upon the defendant to prove a mitigating factor which would reduce his culpability. The confusion generated by the *Mullaney* decision

on this point mandates that this Court reexamine the analysis contained in that decision. Upon such a reexamination the fundamental distinctions between the Maine and New York statutes will become evident.

The Winship *and* Mullaney *Decisions*

In *In Re Winship supra* at 364, this Court declared that in a criminal prosecution, due process requires proof of guilt beyond a reasonable doubt "of every fact necessary to constitute the crime with which [the defendant] is charged." This constitutional principle was then made applicable to juvenile delinquency adjudicatory proceedings. In *Mullaney v. Wilbur, supra*, this Court held that a Maine statute requiring a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter violated the due process requirement as defined in *Winship*.

The *Mullaney* decision has sparked a wealth of litigation in the federal and state courts on questions involving burdens of proof and affirmative defenses. Numerous law review articles have appeared attempting to explain the meaning and scope of the *Mullaney* decision.* The confusion and controversies engendered by the *Mullaney* decision is widespread.

*See, e.g., Constitutionality of Affirmative Defenses in the Texas Penal Code, 28 Baylor L Rev. 120-37 (Winter 1976); Affirmative Defenses in Ohio after *Mullaney v. Wilbur*, 36 Ohio SLJ 828-51 (1975); Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on A Criminal Defendant, 64 Geo. L. J. 871-94 (March 1976); New York Penal Law's Affirmative Defenses after *Mullaney v. Wilbur*, 27 Syracuse L. Rev 834-68 (Spring 1976); Unburdening the Criminal Defendant: *Mullaney v. Wilbur* and the Reasonable Doubt Standard, 11 Harv. Civil Rights L. Rev. 390-431 (Spring 1976); Allen, *Mullaney v. Wilbur*, The Supreme Court and the Substantive Criminal Law — An Examination of the Limits of Legitimate Intervention, 55 Texas L. Rev. (No. 2, 1977) (page proofs graciously furnished prior to publication.)

In *State v. Evans*, 362 A.2d 629 (Md. 1976), the Court read *Mullaney* and *Winship* as deciding that "due process of law is *offended* by placing the burden on the defendant to prove, by any standard, *the existence of mitigating circumstances* necessary to lower a felonious homicide to the level of manslaughter" (emphasis added). The New York Court of Appeals in the instant case read *Mullaney* to "*permit* the defendant to establish *the existence of mitigating circumstances*, collateral to the principal facts at issue. . . ." (emphasis added).

Appellant here asserts that "the Maine law accepted by this Court treated malice aforethought as a policy presumption, connoting no substantive fact required to be proved." Appellant's Brief, page 22. A contrary analysis was employed by the Third Circuit in *United States ex rel. Castro v. Regan*, 525 F.2d 1157 (3d Cir. 1975), *cert. denied*, ——U.S.——, 19 CrL 4067 (1976). There, the court denied habeas corpus relief to the petitioner who claimed he had been denied due process in murder prosecution by a jury instruction that, "The law presumes that all unlawful homicides, that is all unlawful killings, are committed with malice unless the lack of malice is affirmatively demonstrated by the evidence." The Third Circuit distinguished *Mullaney* on the ground that malice was an element of intent, which in New Jersey, unlike in Maine, had to be proven beyond a reasonable doubt by the prosecution and could not be presumed absent proof to the contrary.

Other affirmative defenses have been encompassed by the controversy surrounding *Mullaney: insanity*, see *Rivera v. Delaware*, ——U.S.——, 20 CrL 4030 (1976); *Buzynski v. Oliver*, 538 F.2d 6 (1st Cir. 1976); *Grace v. Hopper*, 234 Ga. 669, 217 S.E.2d 267 (1975); *State v. Berry*, La., 324 So.2d 822 (1975); *State v. Melvin*, Me., 341 A.2d 376 (1975); Note, Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases, 56 B.U.L. Rev. 499 (1976); *inoperable gun during robbery*, see *Reidout v. Hen-*

derson, ——F.Supp.——, slip opinion, October 13, 1976 (S.D.N.Y.) and *Farrell v. Czarnetsky*, 417 F.Supp. 987, (S.D.N.Y. 1976); *People v. Smith*, 380 N.Y.S.2d 569 (N.Y. Co. 1976); *People v. White*, 383 N.Y.S.2d 800 (N.Y. Co. 1976); *entrapment, People v. Hawkins*, 84 Misc.2d 201 (S. Ct. Kings Co. 1975); *felony murder, Robinson v. Warden*, 419 F. Supp. 1 (E.D.N.Y. March 10, 1976), *aff'd*, ——F.2d—— (2d Cir. June 10, 1976); *Westberry v. Mullaney*, 406 F. Supp. 407 (D.C. Maine 1976); *self defense, State v. Bolton*, S.C., 223 S.E.2d 863 (1976); *State v. Shores*, 28 N.C. App. 323, 221 S.E.2d 79 (1976); *abandonment of attempt to commit crime, Cowart v. State*, 136 Ga. App. 528, 221 S.E.2d 649 (1975). A review of these cases and articles clearly establishes the need for this Court to reexamine the analysis employed in the *Mullaney* decision.

Respondent urges this Court to hold in the instant case that the decision in *Mullaney* applied only to the Maine statute and the unique defect contained therein and that affirmative defenses, in general, are not prohibited by the Constitution. Absent such a declaration there will undoubtedly be endless litigation concerning the constitutionality of scores of affirmative defenses promulgated by many states (see, e.g. Table of New York's Affirmative Defenses appended to this brief).

The Defect in the Maine Statute

An analysis of the statutory scheme invalidated in *Mullaney* clearly establishes that the State did not have to prove the element of intent beyond a reasonable doubt to gain a conviction for the crime of murder. Under the Maine statute, the prosecution need only have proved the requisite intent for *manslaughter* to achieve a conviction for murder. This was so because:

(1) Murder and manslaughter were not distinct crimes "but different degrees of the single generic offense of felonious homicide." *State* v. *Wilbur*, 278 A.2d 139 (1971);

(2) Malice aforethought signified a substantive element of intent;

(3) Malice "would be implied unless the defendant proved that he acted in the heat of passion." *Mullaney supra* at 686, 95 S.Ct. at 1883, n.4; and

(4) The burden was on the defendant to negate malice aforethought by proving that he acted in the heat of passion by a preponderance of the evidence.

Thus, under its own interpretation of state law, Maine required "proof of the same element of intent for both murder and manslaughter . . . ." *Id.* at 689, 95 S.Ct. at 1885, n.9. Where the State proved that the defendant had committed a homicide *whether or not he acted with malice aforethought*, the defendant stood convicted of murder unless *he* proved the absence of malice aforethought. The burden of proof upon the prosecution, therefore, was no greater to prove murder than to prove manslaughter. Having established sufficient proof of an intent to commit the crime of *manslaughter*, the State would gain a conviction for the crime of *murder*, unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation.

The effect of the Maine statute was thus to relieve the prosecution of the burden of proof beyond a reasonable doubt of the crime of murder. This shifting of the burden on a critical issue of guilt versus innocence was precisely what the *Winship* decision was intended to prevent:

> Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less 'blameworth(y),. . .

> they are subject to substantially less severe penalties. By drawing this distinction, while *refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns*, Maine denigrates the interests found critical in *Winship*.
>
> *Id.* at 698, 95 S.Ct. at 1889 (emphasis added).

It is significant to note, moreover, that Maine in effect conceded that it had no greater burden to prove murder than manslaughter when it argued that "the fact in question here does not come into play until the jury already has determined that the defendant is guilty and may be punished at least for *manslaughter.*" *Id.* at 697, 95 S.Ct. at 1888-89 (emphasis added).

Thus, Maine subjected a defendant in a homicide case to a greater penalty for murder upon proof beyond a reasonable doubt of the lesser offense of manslaughter. This, respondent respectfully submits, was the defect in the Maine statute which prompted this Court to declare it unconstitutional.

The Defect in the Maine Statute Is Not Present in New York's Homicide Statute

The New York homicide statute differs materially from the Maine statute invalidated in *Mullaney*. Under New York's law:

(1) Murder and manslaughter are separate and distinct offenses;

(2) Malice aforethought is not an element of intent;

(3) A defendant in a homicide case cannot be convicted of murder unless the prosecution has proved an intent to cause death; and,

(4) Neither malice nor intent to cause death is implied in the absence of proof to the contrary by the defendant.

The fundamental differences between the Maine and New York statutes are most dramatically illustrated by the differing

jury instructions in the *Mullaney* and *Patterson* cases. In *Mullaney*, the trial court charged the jury that (a) malice aforethought was an essential and indispensable element of the crime of murder without which the homicide would be manslaughter; (b) malice aforethought was to be conclusively implied from an intentional and unlawful homicide unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation; and, (c) malice aforethought and heat of passion were two inconsistent things and by proving the latter the defendant would negate the former. See *Mullaney supra* at 686-87, 95 S.Ct. at 1883-84.

In the instant case, the trial court charged the jury that (a) murder is an intent crime and the prosecution must prove beyond a reasonable doubt that the defendant intended to kill the victim or some other human being; (b) to find intent, the jury had to find that the defendant had the conscious objective to cause death and that his acts resulted from that conscious objective; (c) whatever proof the defendant may have offered to convince the jury of his innocence, he was not obliged to prove anything; and, (d) the burden was on the defendant to estab. h by a preponderance of the evidence, that his "apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance" (A46-A94).

These differing jury instructions demonstrate the significantly lesser burden of proof upon the prosecution to prove the crime of murder under the previous Maine statute than under the present New York statute. In New York the burden of proof is at all times on the prosecution to prove the element of intent, whereas the Maine statute required the defendant to disprove this crucial element of the crime.

The critical difference between the statutes of the two states may be illustrated by applying each of them to the same

hypothetical case. Under the following set of hypothetical facts, a defendant would have been convicted of murder in Maine whereas in New York, these facts would only support a conviction for manslaughter:

(1) V, victim, is dead;

(2) The cause of death was a bullet in V's head;

(3) D, defendant, intentionally fired the gun which caused the bullet to lodge in V's head.

Under these facts, the prosecution in Maine would have satisfied its burden to convict the defendant of murder. Malice aforethought would have been implied from these facts and *unless* the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, he would be guilty of murder.

In New York these facts, *standing alone*, would not be sufficient to support a conviction for murder, since they do not evidence the requisite element of intent to cause death. The prosecution would be required to evince further facts concerning the circumstances of the death (e.g. proximity of V and D at the time of the shooting, D's expertise in handling a gun, D's knowledge that the gun was loaded, etc.) to sustain a conviction for murder.

Hence, in New York a defendant cannot be convicted of the crime of murder absent proof beyond a reasonable doubt of every element of the crime of murder. In Maine, the affirmative defense of heat of passion on sudden provocation reduced the burden of proof upon the prosecution, whereas in New York the burden of proof remains with the prosecution on all elements of the crime of murder. The New York statute thereby satisfies the *Winship* rule that the reasonable doubt standard applies to every fact necessary to constitute the crime with which the defendant is charged.

No Significant Difference Regarding Burden of Proof Exists between New York's Affirmative Defense of Extreme Emotional Disturbance and the Affirmative Defense of Insanity Upheld by this Court.

In *Leland* v. *Oregon*, 343 U.S. 790 (1952), this Court upheld the constitutionality of a state statute requiring a defendant who pled insanity to establish that defense beyond a reasonable doubt. In *Mullaney*, Mr. Justice Rehnquist, joined by The Chief Justice, reaffirmed the validity of the *Leland* decision. Recently, this Court upheld a Delaware statute in *Rivera* v. *Delaware supra* requiring a defendant raising an insanity defense to prove mental illness or defect by a preponderance of the evidence.

It seems clear, therefore, that a state may constitutionally require the defendant to bear the burden of proving the affirmative defense of insanity. Indeed, every state that has recently considered the question has so held. *State* v. *Pendry*, 227 SE2d 210 (W. Va. Ct. App. 1976); *Breland* v. *State*, 489 SW2d 623, *cert. denied*, 412 US 939 (Texas Ct. of Crim. App. 1972); *State* v. *Berry*, La. 324 So.2d 822 (1975); *Grace* v. *Hopper*, 234 Ga. 669, 217 SE2d 267 (1975); *State* v. *Melvin*, Me., 341 A.2d 376 (1975); see also *Buzynski* v. *Oliver*, 538 F.2d 6 (1st Cir. 1976).

Appellant seeks to escape the weight of this authority by arguing that there are significant differences between the defense of insanity and the defense of extreme emotional disturbance. Respondent submits, however, that whatever differences exist between the two defenses detract from, rather than aid, appellant's constitutional attack.

The defense of insanity clearly relates to the issue of the defendant's guilt or innocence. If the defense succeeds, the defendant will be exculpated from the crime charged. The defense of extreme emotional disturbance has no such impact. Successful use of this defense results only in mitigation of the

offense and reduction in exposure to punishment. Inasmuch as the very guilt or innocence of the defendant is at stake where insanity is pleaded, but such is not the case where the defense is extreme emotional disturbance, surely the defendant having to prove insanity bears a heavier burden. Indeed, a defendant who successfully interposes a defense of insanity, unlike the defendant who succeeds in pleading extreme emotional disturbance, "is free of the stigma of being a criminal and will not be criminally confined." *Buzynski* v. *Oliver supra* at 8.

To the extent that each defense imposes a hardship upon the prosecution to negate, the greater hardship exists in negating the defense of extreme emotional disturbance. It is extremely unlikely that a persuasive case can be made out for insanity on lay testimony alone. See LaFave and Scott, Criminal Law §40, p. 314 (1972). Lay testimony can, however, be persuasive in establishing the defense of extreme emotional disturbance, since the ultimate issue is "whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence." Model Penal Code §201.3, Comment (Tent. Draft No. 9, 1959). Indeed, the sympathy — arousal aspect of the defense of extreme emotional disturbance, in addition to the fact that it only results in mitigation of the offense, surely makes it more difficult to refute before a jury than does a defense which exculpates the defendant.

Appellant's argument that the "state practices do not support shifting the burden on extreme emotional disturbance" is also ill founded. While plainly worth considering, "[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process . . . ." *Leland* v. *Oregon supra* at 798. It is significant to note, moreover, that in *Leland* this Court upheld a statute that was unique.

Respondent respectfully submits, therefore, that inasmuch as "[t]he purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity . . ." (A111), and this affirmative defense is only a mitigating circumstance and not exculpatory, as is the defense of insanity, this New York statute should pass constitutional muster as readily, if not more so, than the statutes upheld in the above-cited cases.

POINT II

Should this Court wish to reach the issue of retroactive application of *Mullaney v. Wilbur* in this case, respondent urges that *Mullaney* not be given retroactive effect.

Inasmuch as the defendant's conviction predated the *Mullaney* decision, retroactive application of that decision is required before he may derive any benefit therefrom. Although this Court has not yet determined to apply *Mullaney* retroactively, the New York Court of Appeals interpreted the *Mullaney* decision so as to require retroactive application. Since, however, the court ultimately determined that New York's affirmative defense of extreme emotional disturbance does not violate due process, the retroactivity issue is moot in this appeal.

This Court has noted probable jurisdiction in *Hankerson v. North Carolina* (No. 75-6568), where the issue of retroactive application of *Mullaney v. Wilbur* is squarely presented. The arguments against applying *Mullaney v. Wilbur* retroactively or giving limited retroactive application are outlined in the respondent's brief filed in *Hankerson*. Should this Court wish to reach the issue of retroactive application of *Mullaney v. Wilbur* in this case, respondent argues that *Mullaney* not be given retroactive effect.

CONCLUSION

In conclusion, respondent contends that the New York affirmative defense of extreme emotional disturbance comports with basic concepts of due process. Under this Court's decisions in *Winship* and *Mullaney*, due process requires the State to bear the burden of proof beyond a reasonable doubt "of every fact necessary to constitute the crime with which [the defendant] is charged." This due process standard does not prohibit the placing of the burden of proof upon the defendant to establish an affirmative defense in mitigation of the most serious crime charged, where the prosecution has established all of the elements of that crime beyond a reasonable doubt. The Maine statute invalidated in *Mullaney* did not satisfy this standard, because the prosecution did not have the burden of proving intent to cause death beyond a reasonable doubt. The New York statute challenged in the instant case does not contain this defect and, in fact, places a lesser burden on the defendant than do statutes, upheld by this Court, which require a defendant to prove the defense of insanity.

For the above-stated reasons, it is respectfully submitted that the decision of the New York Court of Appeals upholding the constitutionality of New York's affirmative defense of extreme emotional disturbance should be affirmed.

Dated: Bath, New York
December, 1976

Respectfully submitted,

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APPENDIX

TABLE OF NEW YORK'S AFFIRMATIVE DEFENSES

Penal Law Section	Crime	Substance of Affirmative Defense
40.00(1)	any offense	Defendant coerced by the use or threatened imminent use of unlawful physical force on defendant or a third person which a person of reasonable firmness would be unable to resist.
40.05	any offense	Entrapment — Defendant induced or encouraged to engage in proscribed conduct by public servant or one cooperating with public servant seeking to obtain evidence for prosecution and methods used created a substantial risk that offense would be committed by one not otherwise disposed to commit it.
40.10(1)	any offense other than attempt where guilt depends on liability for acts of another	Renunciation — Under circumstances manifesting a voluntary and complete renunciation, defendant withdrew prior to commission of offense and made a substantial effort to prevent it.
40.10(2)	criminal facilitation	Prior to commission of offense which defendant facilitated, substantial effort was made by defendant to prevent the felony.

Table of New York's Affirmative Defenses

Penal Law Section	Crime	Substance of Affirmative Defense
40.10(3)	attempt	Voluntary with a complete renunciation of criminal purpose, defendant avoided commission of crime by abandoning effort and if necessary took other affirmative steps to prevent it.
40.10(4)	criminal solicitation	Where crime not committed voluntarily and complete renunciation of purpose and defendant prevented the crime.
125.25(1)	Murder second degree	Extreme emotional disturbance with reasonable explanation determined by viewpoint of person in defendant's situation with this knowledge or defendant's conduct was to aid without duress another's suicide.
125.25(3)	Murder second degree	Defendant did not commit, aid or request act, was not armed with a deadly weapon capable of causing serious injury or death, had no reasonable ground to believe others had such a weapon and intended to act in a manner likely to result in death or serious physical injury.
130.10	Sexual offenses where lack of consent is based on incapacity	Defendant had no knowledge of facts or conditions responsible for incapacity at time of offense.

Table of New York's Affirmative Defenses

Penal Law Section	Crime	Substance of Affirmative Defense
135.75	Coercion by instilling in victim fear of prosecution	Defendant reasonably believed the charge to be true and his sole purpose was to induce victim to make good the wrong.
150.05(2)	Arson in the fourth degree	Only defendant had a possessory or a proprietary interest in the building.
150.05(2)	Arson in the third degree	Only defendant had a proprietary interest in the building or others with an interest consented, sole intent was to destroy for lawful purpose, no reasonable ground to believe conduct would endanger life, safety or damage another building.
155.15(1)	Larceny by trespass or embezzlement	Appropriated under claim of right made in good faith.
155.15(2)	Larceny by instilling in victim fear of prosecution	Defendant reasonably believed the charges to be true and sole purpose was to induce victim to make good the wrong.
160.15	Robbery first degree	Weapon not loaded or incapable of firing a shot causing injury or death.

Table of New York's Affirmative Defenses

Penal Law Section	Crime	Substance of Affirmative Defense
190.15	Issuing a bad check	Defendant or another in his behalf made full satisfaction within ten days after dishonor or defendant acted as employee executing orders of superior authorized to direct his activities.
190.20	False advertising	False statement was not knowingly or recklessly made.
210.25	Perjury	Defendant retracted false statement during proceeding in which it was made before it substantially affected the proceeding and before its falsity was or would be exposed.
215.45(2)	Compounding a crime	Benefit did not exceed amount defendant reasonably believed due as restitution for harm caused by the crime.
215.59	Bail-jumping and failing to respond to appearance ticket	Defendant's failure to appear was unavoidable and due to circumstances beyond his control and during the time between expiration of thirty day period and commencement of action defendant appeared voluntarily or was unable as a result of circumstances beyond his control.

Table of New York's Affirmative Defenses

Penal Law Section	Crime	Substance of Affirmative Defense
235.15	Obscenity	Audience consisted of persons having scientific, educational, governmental or similar justification for viewing or possessing.
260.15	Endangering the welfare of a child by failure to provide medical care	Defendant is parent or guardian, is a member of organized group that proscribes prayer as principal treatment of illness and child treated in accord with that belief.

FOR ARGUMENT

In The

Supreme Court of the United States

October Term 1976

No. 75-1861

GORDON G. PATTERSON, JR.,
Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the
New York Court of Appeals

REPLY BRIEF FOR THE APPELLANT

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ARGUMENT

POINT I

Appellant's Conviction Must Be Reversed Since The Decision Of This Court In *Mullaney v. Wilbur* Requires That Where The Presence Or Absence Of The Mitigation Factor Is Critical To The Murder-Manslaughter Dichotomy The Persuasion Burden Must Be Placed Upon The State.

The Respondent* contends that "... the statutory scheme invalidated in *Mullaney* clearly establishes that the State did not

*The People have designated themselves as Respondent and will be referred to as such throughout this Reply Brief.

have to prove the element of intent beyond a reasonable doubt to gain a conviction for the crime of murder" (Respondent's Brief, p. 12). Respondent makes the astounding claim that intentionally firing a gun which results in a person's death is, without more, murder in Maine and manslaughter in New York (Respondent's Brief, p. 16). This contention is, quite simply, not true. Under both the New York and Maine homicide schemes the killing of another person with the intention to cause death is murder and must be proven by the prosecution beyond a reasonable doubt, and only if so proved is the jury to consider the distinction between murder and manslaughter. *Mullaney v. Wilbur*, 421 U.S. 684, 685 n.2, 686 (1975); *State v. Lafferty*, (Me.) 309 A.2d 647 (1973); Charge of the Court in *Patterson* (A. 79).* A corollary to this is that under Maine law (at the time of the *Mullaney* decision) where the mitigation defense is not put in issue, the defendant is not entitled to a manslaughter charge. *State v. Inman*, (Me.) 350 A.2d 582, 585, 586 (1976). Respondent in fact states that the trial judge in *Mullaney* charged that an intentional and unlawful homicide is murder unless the defendant proved the mitigating factor (Respondent's Brief, p. 15).

Essential to Respondent's claim is the erroneous view that malice aforethought under the Maine rule is a distinct substantive element of intent that the state is relieved of proving because the defendant must negate this element by proving heat of passion. (Respondent's Brief, p. 13). This argument misses two essential and related points made clear in *Mullaney*. First, malice aforethought in Maine law is not a substantive element of intent, but flows from proof by the State of an intentional killing. This Court in *Mullaney* thus described malice aforethought as "wholly unnecessary" (421 U.S. at 686 n.4) and "surplusage" (Id. at 693, n.15); *see also*, 421 U.S. at 685 n.2, 686, 688, 689 n.9, 690 n.10, 694. The concomitant point

*A refers to the separately bound Appendix filed with this Court.

missed by the People's argument is that malice aforethought and heat of passion are inextricably linked — two sides of the same coin — and malice aforethought is merely an affirmative statement of a negative condition (i.e. the absence of heat of passion). Thus, nothing turns on the fact that Maine had a (positive) name for the absence of heat of passion while New York does not.* This Court in *Mullaney* stated the issue before it no less than four times in the course of the opinion and on all occasions referred only to the presence or absence of heat of passion as the critical issue. 421 U.S. at 684-85, 692, 696 and 703.

In sum, the "critical fact in dispute" (421 U.S. at 701) under the Maine and New York homicide rules is the mitigation factor, the presence or absence of which distinguishes murder from manslaughter. The mitigation factor is set into bold relief in New York because it is the distinguishing factor between the two distinct crimes of murder and manslaughter while Maine claimed to have only one generic offense of homicide with separate punishment categories.

POINT II

State Court Litigation On The *Mullaney* Rule Has Had A Salutary Effect.

Respondent claims that a reversal of Appellant's conviction will lead to "endless litigation" concerning the constitutionality of various affirmative defenses, and cites numerous such defenses in New York (Respondent's Brief, p. 12). Appellant submits that administrative considerations cannot provide the answer to the question of whether or not a conviction has been

*The case cited by the Respondent at page 11 to bolster this view in fact explicitly supports the view that in Maine malice aforethought is a "policy presumption" rather than a substantive element of intent. *United States ex rel. Castro v. Regan*, 525 F.2d 1157, at 1160 (3rd Cir. 1975), *cert. denied*, U.S. , 19 Cr. L 4067 (1976).

unconstitutionally obtained. Moreover, once the major affirmative defenses such as entrapment, self-defense and the felony-murder defense are explicitly dealt with by this Court, in one or more opinions, the major outlines of the scope of *Winship* and *Mullaney* should be clear. Thus, *Mullaney* need not be the source of endless litigation.

Moreover, litigation at the lower court level on a case by case (i.e. defense by defense) basis may have the salutary effect of clarifing the issues involved in each defense. An example of this is what has occurred in Maine after *Mullaney*. The Maine Supreme Judicial Court has recently held that it is a violation of the Due Process Clause to place the burden of persuasion upon the defendant of the entrapment defense. *State v. Matheson*, (Me.) 363 A.2d 716 (1976). On the other hand, in another post-*Mullaney* case the Maine Court upheld placing upon the defendant the burden of persuasion of the insanity defense. *State v. Melvin*, (Me.) 341 A.2d 376 (1975).*

Mullaney is also causing lower courts to take a searching and independent look at rules which shift the persuasion burden in criminal cases. In *State v. Matheson, supra*, the Supreme Judicial Court relied on the reasoning of its own pre-*Mullaney* decision in *State v. Millet*, (Me.) 273 A.2d 504 (1971).**

*The Delaware Supreme Court has similarly analyzed in light of *Mullaney*, two affirmative defenses placing the persuasion burden on the defendant. It struck down shifting to the defendant the persuasion burden of the affirmative defense to murder of extreme emotional distress (*Fuentes v. State*, (Del.) 349 A.2d 1 (1975)) and upheld placing on the defendant the persuasion burden on the insanity defense (*Rivera v. State*, (Del.) 351 A.2d 561 (1976); *appeal dismissed sub nom. Rivera v. Delaware*, U.S. , 45 U.S.L.W. 3279 (1976)).

**In *Millet*, the Maine Court held that the prosecution must bear the persuasion burden on the issue of self-defense, because otherwise a jury of laymen could be confused by being presented with what are in essence conflicting burdens in the same case.

Another important development in Maine after *Mullaney* is that the production burden (as opposed to the persuasion burden) is taking on renewed significance. In *State v. Inman*, (Me.) 350 A.2d 582, 586, 587 (1976) the Maine Supreme Judicial Court held that since a defendant in a murder trial did not meet the production burden on the provocation issue, the prosecution was relieved of any burden on that issue.

The *Inman* case demonstrates that holding a defendant to a production burden on a given defense can mitigate the claimed hardship on the prosecution in meeting the persuasion burden. If the defendant does not produce "some evidence" on the issue the prosecution has no actual burden. Moreover, if a defendant does produce "some evidence" such production is likely to be "all evidence" the defendant has at his disposal on the issue.* In this latter situation, the question is not hardship of proof but how laymen on a jury are told to assess that proof. *Speiser v. Rundall*, 357 U.S. 513, 520, 521 (1958).

Imposing a production burden on a defendant suggests that in most cases a state has a device at its disposal to mitigate a claimed "unique hardship" of proof, 421 U.S. at 702, n. 31; *see generally*, Ashford and Risinger, Presumptions, Assumptions and Due Process: An Overview, 79 Yale L.J. 165 (1969); *see also*, Perkins, Criminal Law, 49-51 (2d ed. 1969).

Thus Maine is coping with *Mullaney*. Where the persuasion burden is shifted the courts are analyzing and scrutinizing each situation. Where a persuasion burden is found unwarranted, a production burden may nevertheless remain upon the defendant.

*The *Patterson* case is a good example. Patterson produced eleven witnesses who testified to his relations with his wife plus a psychiatrist whose testimony was uncontroverted. *People v. Patterson*, 39 N.Y. 2d 288, 292, 304 (A-97, A-113).

POINT III

The Insanity Cases Do Not Control This Appeal.

Respondent argues that the insanity cases should control this appeal (Respondent's Brief, p. 17). Appellant submits a reversal of Appellant's conviction need not pre-judge any other affirmative defense cases, and particularly need not affect or be affected by this Court's rulings with respect to the burden of proving insanity.

Unlike insanity, and like heat of passion, extreme emotional disturbance necessarily relates to the facts of the crime in that the very raising of the defense places the defendant at the scene of the crime and admits the fatal act. Insanity on the other hand is usually unrelated to the facts of the crime. Thus in a given case, dissimilar evidence can be used to prove the crime and to prove insanity.* Insanity is also radically more subjective and amorphous in its actual proof than extreme emotional disturbance because the major source of proof of insanity is the defendant's mind and not external things and events from which a jury may draw inferences.** Nor is insanity anchored like extreme emotional disturbance to an ultimate causal standard of a reasonable explanation or excuse. The effect of these unique questions of proof involved in the insanity defense (such that in 1969 — seventeen years after *Leland* — 24 states still require the defendant to prove the defense)*** justifies separate scrutiny by this Court.

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*This is in tandem with the view that non-responsibility for a crime due to insanity, is a separate issue from the question of guilt or innocence of that crime. Unique hardship in proving insanity is thus only relevant if *Winship* and *Mullaney* are viewed as encompassing facts going to responsibility for, as well as to guilt or innocence of a crime.

** The *Patterson* case demonstrates this difference. The trial judge charged the jury:

> "What actually happened here is clear, although there are some minor discrepancies between the stories told from the witness stand." (A. 73)

***Comment, 30 La. L. Rev., 117 n.l., 118 n.2 (1969).

POINT IV

Mullaney Should Be Applied Retroactively, At Least To Cases On Direct Appeal.

This Court has already granted certiorari and remanded for reconsideration in light of *Mullaney* four cases involving convictions and state appellate decisions prior to the day *Mullaney* was handed down. *Sparks v. North Carolina*, U.S. , 96 S.Ct. 3213 (1975); *Wetmore v. North Carolina*, U.S. , 96 S.Ct. 3213 (1975); *Burko v. Maryland*, 422 U.S. 1003 (1975); *Castro v. Regan*, 422 U.S. 1003 (1975).* In fact, *Castro*, like *Mullaney* itself, reached this Court by way of collateral attack. It would appear that this Court does regard *Mullaney* as retroactive.

Appellant has already argued that because *Mullaney* affects the very integrity of the fact finding process, it should be applied retroactively without consideration of the factors of reliance by law enforcement authorities or the effect on the administration of justice. *Williams v. United States*, 401 U.S. 646, 653 (1971).

Assuming *arguendo* that these latter factors are relevant it should be pointed out that, at least with respect to the mitigation to murder defense, only a minority of jurisdictions place the persuasion burden on the defendant, 421 U.S. at 696; Appendix A to Appellant's Brief. Further, even these jurisdictions will not have to consider murder convictions unless the mitigation defense was "properly presented" (421 U.S. at 704).** In fact, these few affected jurisdictions in these limited

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*These cases were affirmed on remand. *Burko v. State*, 28 Md. App. 732, 349 A.2d 355 (1975); *cert. denied sub nom. Burko v. Maryland*, U.S. , 45 U.S.L.W. 3400; *Castro v. Regan*, 525 F.2d 1157 (3rd Cir. 1975), *cert. denied*, U.S. , 19 Cr. L. 4067 (1976).

**In New York, this would only date back to 1965 when the Penal Law was revised.

situations will have an option to reduce the murder convictions to manslaughter, without re-trying the cases. Thus, the effect on the administration of justice need not be great.

CONCLUSION

For the reasons stated in Appellant's Brief and Reply Brief, it is respectfully submitted that the decision of the New York Court of Appeals should be reversed and a new trial should be ordered.

Dated: February, 1976

Respectfully submitted,

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(affidavit of service omitted in printing)

CORRECTION

Footnote 21 on page 33 of Appellant's Brief should read:

[21]The *Patterson* majority, 39 N.Y.2d at 301, A.109, stated that "the Model Penal Code does not, expressly state that the burden of establishing mitigating circumstances is upon the Defendant." It should be pointed out that the structure of the Model Penal Code is such that the burden shifts to a defendant only when the Code "plainly requires" this. Model Penal Code, Proposed Official Draft, §1.12(2)(b) (1962). Thus, not expressly stating that the burden is on the defendant to prove extreme emotional disturbance *is* stating that the persuasion burden does not shift.